THE NEGOTIABLE INSTRUMENTS LAW

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The Negotiable Instruments Law Annotated

WITH

References to the English Bills of Exchange Act and with the Cases under the Negotiable Instruments Law and the Bills of Exchange Act and Comments thereon

BY

JOSEPH DODDRIDGE BRANNAN
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Together with Comments and Criticisms on the Negotiable Instruments Law

(Reprinted from the Harvard Law Review, the Yale Law Journal and the American Law Register)

BY

JAMES BARR AMES (Formerly Dean of the Harvard Law School), JUDGE LYMAN D. BREWSTER (Formerly President of the State Boards of Commissioners for Promoting Uniformity of Legislation), and CHARLES L. McKEEHAN, Esq. (Formerly Lecturer on the Law of Bills and Notes in the University of Pennsylvania)

THIRD EDITION

REVISED—RE-ARRANGED—ENLARGED

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PREFACE TO THIRD EDITION

The same course has been pursued in the preparation of this edition as for the last edition. The author has endeavored to examine all the cases reported since that edition and either to abstract or cite them generally under the appropriate sections. It is believed that if any cases have been overlooked, the number is few. Those who wish to find cases decided since this book went to press, are advised to consult the National Reporters Series after the following volumes: 103 Atlantic, 169 New York Supplement, 119 Northeastern, 167 Northwestern, 169 Pacific, 78 Southern, 95 Southeastern, 199 Southwestern and 248 Federal.

In this, as in former editions, some cases are cited generally under the sections, without abstracts. As explained in the "Arrangement," infra, p. lxviii these cases are mainly cases in which the act was not cited or in which its application or interpretation was too plain for discussion, or which, although relatively unimportant, the practicing lawyer may yet wish to examine. To facilitate such examination, these cases have been rearranged alphabetically by states.

Also, where a number of cases are cited in support of a principle, the author has endeavored to cite first a case, which has seemed best to express the principle, and then to cite the cases in accord, in alphabetical order by states.

In this edition, as in the others, abstracts of English, Scotch and Irish cases are also given. There is no danger in consulting these cases, since any differences between the English and American acts are indicated in notes to the sections. How helpful these cases may be is illustrated by the discussion, under sections 14 and 52, of the question, whether a payee may be a holder in due course, in which the Supreme Courts of Alabama and Massachusetts were aided in reaching a correct conclusion by their study of the English cases.

After much consideration and consultation with others, the author decided to continue, as part of the book, the articles by

Dean Ames, Judge Brewster and Mr. McKeehan, with the omission of a few pages, containing personal amenities or criticisms, not necessary to the discussion of the merits of the act. The table of comparative sections of the act has been thoroughly revised. The sectional numbers in the latest revisions in the various states are given and those in the states which had not previously adopted the act at the time of the last edition have been included. For the history of the act and a statement of the differences in the structure of the English and American acts, and for the plan on which this book is constructed, the reader is referred to the preface to the first edition.

The author wishes to make grateful acknowledgment of the help given to him, during the preparation of this edition, by Professor Samuel Williston of the Harvard Law School, in many discussions on various sections of the act and in the analysis and criticism of cases under the act, some of which the author might have hesitated to make, if his own opinion had not been confirmed by his former colleague's expert judgment and great knowledge of the subject of Negotiable Instruments. And to Professor Zechariah Chafee, a former pupil of the author, and now teaching the subject of Bills and Notes in the Harvard Law School, the author is indebted for the much improved and greatly enlarged index, covering both the sections of the act and the cases.

J. D. BRANNAN.

PREFACE TO FIRST EDITION

THE Negotiable Instruments Law is based upon and largely copied from the English Bills of Exchange Act, a codification of the law of England as to bills of exchange, promissory notes and checks, which was drawn by Judge Chalmers and enacted by Parliament in 1882.[1]

At a meeting of the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation in the United States, held in August, 1895, a committee was appointed, who caused a draft of a bill codifying the law of negotiable instruments to be prepared and submitted to the Conference at its annual meeting in August, 1896. This draft, entitled "The Negotiable Instruments Law," was discussed by the Conference and was agreed upon for recommendation to the Legislatures of the States.[2] The law has been adopted in the District of Columbia and in thirty-four States and Territories,[3] in a few cases with some modifications, but generally in the identical form recommended.

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[1] Chalmers, Bills of Exchange, Introduction to Third Edition. See also *infra*, page 99 (page 220 in this edition).

[2] See a more extended history of the Law, *infra*, page 100 (page 221 in this edition).

[3] **Alabama.**—Laws of 1907, page 660. In effect January 1, 1908.
Arizona.—R. S. 1901, Title XLIX. In effect September 1, 1901.
Colorado.—Laws of 1897, ch. 64. Approved April 20, 1897.
Connecticut.—Laws of 1897, ch. 74. Approved April 5, 1897.
District of Columbia.—Laws of 1899 (U. S. Stats.) ch. 47. In effect April 3, 1899.
Florida.—Laws of 1897, ch. 4524. Approved June 1, 1897.
Hawaii.—Laws of 1907, Act 89. In effect April 20, 1907.
Idaho.—Laws of 1903, page 380. In effect March 10, 1903.
Illinois.—Laws of 1907, page 403. Approved June 5, 1907.*
Iowa.—Laws of 1902, ch. 130. Approved April 12, 1902.
Kansas.—Laws of 1905, ch. 310. In effect June 8, 1905.
Kentucky.—Acts 1904, ch. 102. Approved March 24, 1904.
Louisiana.—Laws of 1904, Act 64. Approved June 29, 1904.

* The amendments suggested by Professor Ames, in the following articles to sections 9, 29, 34, 37, 40, 49, 64, 66, 68, 70, 119, 120, 137, and 186 of the Law, as recommended by the Commissioners, were adopted in whole or in part in the Illinois Act.

The Negotiable Instruments Law, taken as the standard and herein given, is in the form recommended by the National Conference of State Boards of Commissioners. The sectional numbering of the Law, as adopted in several of the States, differs from that adopted in the Law as recommended by the Commissioners, but, as the headings of the titles and articles are the same, except in two or three States, which omit the headings altogether, there will be little difficulty in finding in the Law, as herein printed, the section corresponding to any given section of the Law as adopted in any particular State. Speedy reference may, however, be facilitated in any State, in which the sectional numbering has been changed, by writing opposite the sections as herein given the numbers of the sections of the Law as enacted in such State. In December, 1900, after the Law had been adopted in several States, Professor James Barr Ames, Dean of the Harvard Law School, published in the *Harvard Law Review* an article commending some features of the Law and criticising others. An answer to these criticisms, written by Judge Lyman D. Brewster, President of the National Conference of State Boards of Commissioners, was soon after published in the *Yale Law Journal*. This was followed by other articles by Professor Ames in defense of his position. Finally

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Maryland.—Laws of 1898, ch. 119. Approved March 29, 1898.
Massachusetts.—Laws of 1898, ch. 533. In effect January 1, 1899.
Massachusetts.—Laws of 1899, ch. 130. In effect March 6, 1899.
Michigan.—Public Acts 1905, page 389. Approved June 16, 1905.
Missouri.—Laws of 1905, page 243. Approved April 10, 1905.
Montana.—Laws of 1903, ch. 121. In effect March 7, 1903.
Nebraska.—Laws of 1905, ch. 83. In effect August 1, 1905.
New Jersey.—Laws of 1902, ch. 184. Approved April 4, 1902.
New Mexico.—Laws of 1907, ch. 83. Approved March 21, 1907.
New York.—Laws of 1897, ch. 612. Became a law May 19, 1897.
New York.—Laws of 1898, ch. 336. Became a law April 20, 1898.
North Carolina.—Laws of 1899, ch. 733. In effect March 8, 1899.
North Dakota.—Laws of 1899, ch. 113. Approved March 7, 1899.
Ohio.—Laws of 1902, page 162. In effect January 1, 1903.
Oregon.—Laws of 1899, page 18. Approved February 16, 1899.
Pennsylvania.—Laws of 1901, page 194. In effect September 2, 1901.
Rhode Island.—Laws of 1899, ch. 674. In effect July 1, 1899.
Tennessee.—Laws of 1899, ch. 94. In effect May 16, 1899.
Utah.—Laws of 1899, ch. 83. In effect July 1, 1899.
Virginia.—Laws of 1897-8, ch. 866. Approved March 3, 1898.
Washington.—Laws of 1899, ch. 149. In effect March 22, 1899.
West Virginia.—Acts of 1907, ch. 81. In effect January 1, 1908.
Wisconsin.—Laws of 1899, ch. 356. In effect May 15, 1899.
Wyoming.—Laws of 1905, ch. 43. In effect February 15, 1905.

Mr. Charles L. McKeehan, Lecturer on Bills and Notes in the Law Department of the University of Pennsylvania, published in the *American Law Register* (now the *U. of P. Law Review*) a "Review of the Ames-Brewster Controversy." In 1902 a compilation consisting of the Negotiable Instruments Law and of the articles by Professor Ames and Judge Brewster was published by the Harvard Law Review Publishing Association for use as an aid to teacher and pupil in the course on Bills and Notes in the Harvard Law School. This compilation has not only been found useful in that course, but has proved of service to the legal profession and to law students generally. Mr. McKeehan's "Review of the Ames-Brewster Controversy," which appeared too late to be included in the former compilation, is so interesting and instructive that it seems highly desirable that it should be made more conveniently accessible by including it within the same covers as the articles reviewed. It seemed also that it would be advisable to set opposite each other in parallel columns the corresponding provisions of the Bills of Exchange Act and of the Negotiable Instruments Law. But this has been found impracticable because of the difference in the structure of the two statutes, a difference which must be borne in mind in comparing the two statutes and in searching them for equivalent provisions.

Part I of the Bills of Exchange Act is devoted to definitions of terms used in the Act. Part II deals with bills of exchange and enacts rules as to Form and Interpretation, Capacity and Authority of Parties, Consideration, Negotiation, General Duties of the Holder, Liabilities of Parties, Discharges, etc. Part III, after providing that in general the provisions applicable to bills of exchange payable on demand shall apply to a check, enacts certain rules specially applicable to checks. Part IV makes certain special provisions as to promissory notes, and then provides that, subject to certain exceptions, the provisions of the Act relating to bills of exchange shall, with the necessary modifications, apply to promissory notes. Part V contains certain supplementary provisions, some of which are not applicable to this country.

Title I of the Negotiable Instruments Law, while dealing with the same subjects as Part II of the Bills of Exchange Act, groups bills of exchange and promissory notes under the designation of "instruments," and states the rules applicable to both kinds of negotiable instruments. Title II provides rules relating only to bills of exchange. Title III gives a definition of promissory notes and adds a few provisions peculiar to checks. Title IV defines a

number of words used in the Law and makes also a few general provisions.

It will thus be seen that many of the provisions which are common to both statutes are enacted in the Negotiable Instruments Law as to both bills and notes, under the general description of instruments, while, in the Bills of Exchange Act, they are specially enacted as of bills of exchange and made applicable to promissory notes only by the general provision of Part IV of that Act. But while it has not seemed feasible to illustrate the differences between the two statutes by the parallel column method, the plan has been adopted of giving in the notes to the Negotiable Instruments Law those sections of the Bills of Exchange Act which differ more or less from the corresponding provisions of the Negotiable Instruments Law, and of noting the fact wherever any particular provision of the Negotiable Instruments Law is not found in the Bills of Exchange Act. The absence of a note to any provision of the Negotiable Instruments Law indicates that the Bills of Exchange Act contains substantially the same provision, although the language may sometimes differ.

An Appendix sets forth such provisions of the Bills of Exchange Act as have not been adopted by the Negotiable Instruments Law and have not already been mentioned or quoted in the notes to the Negotiable Instruments Law. Tables of the corresponding sections of the two statutes are also given in an Appendix. The fact that a provision is to be found in the one statute, but not in the other, does not necessarily mean that the principle set forth in such provision is not the law in the other country, for both statutes contain provisions to cover such omissions, the Bills of Exchange Act providing in section 97 (2) that "The rules of common law, including the law merchant, save so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and checks," and the Negotiable Instruments Law providing in section 196 that "In any cases not provided for in this act the rules of the law merchant shall govern."

It is not within the scope of this work to annotate those sections of the Law under which no cases have been decided. This has been done in other books. But all the cases decided under the Bills of Exchange Act and under the Negotiable Instruments Law and reported to April 1, 1908, have been examined and, with a few exceptions, deemed unimportant, have been given in Appendices with cross-references and comments.

In addition to the articles in this compilation the student will find the Negotiable Instruments Law discussed in articles by Hon. Amasa M. Eaton, now President of the National Conference of State Boards of Commissioners, 2 Michigan Law Rev. 260; by John Lawrence Farrell, Esq., 3 Brief of Phi Delta Phi 131, 5 *Ib.* 1; by Judge Julian W. Mack, 1 Illinois Law Rev. 592; by Professor Louis M. Greely, 2 Illinois Law Rev. 145. See also a series of articles in 16 Banking Law Journal, beginning at page 315.

On behalf of *The Harvard Law Review* and of himself the Editor gratefully acknowledges the courtesy of the *Yale Law Journal,* the *American Law Register,* and of Judge Brewster and Mr. McKeehan in granting permission for the republication of their articles. And the Editor also acknowledges his indebtedness to the Hon. Amasa M. Eaton for copies of his lists of cases decided under the Negotiable Instruments Law and for other valuable information. Although great care has been taken in the comparison of the English and American statutes and in other respects, it is too much to hope that the result is without fault. The Editor will, therefore, consider it a favor to have his attention called to any errors which may be discovered in any part of this work.

J. D. Brannan.

Cambridge, Mass., July, 1908.

PREFACE TO SECOND EDITION.

In this edition the book has been rearranged. The articles on the Negotiable Instruments Law by Professor Ames, Judge Brewster and Mr. McKeehan have been preserved in full for the benefit of the student and the practicing lawyer, but a brief summary of the comments and criticisms in the articles has been placed after each of the sections therein discussed. The English and American cases which in the first edition were given in Appendices III and IV have been brought under the sections to which they relate, and all the cases decided under the Bills of Exchange Act and the Negotiable Instruments Law since the preparation of the first edition have been added. Some of these recent cases are cited generally, but of the most of them brief abstracts are given with frequent comments by the editor.

A new feature consists in a statement after each section of the changes, if any, made in the Law by the various States which have adopted it.

A table showing the corresponding sections of the Law as found in the statutes of the different States has been added. Cumulative references to the regular reports, the National Reporter System, the American State Reports and the Lawyers Reports Annotated are made as to all the cases cited or abstracted.

Appendix I containing those provisions of the Bills of Exchange Act which were not adopted by the Negotiable Instruments Law is retained, and abstracts of the cases decided under such provisions have been added. Appendix II containing comparative tables of the sections of the Bills of Exchange Act and the Negotiable Instruments Law is also retained.

It is hoped that the changes made in this edition will make the book more useful to the Bench and the Bar without impairing its value to the student.

J. D. BRANNAN.

November, 1910.

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LIST OF STATES AND TERRITORIES WHICH HAVE ADOPTED THE NEGOTIABLE INSTRUMENTS LAW

Alabama.—Laws of 1907, page 660. In effect January 1, 1908.

Alaska.—Laws of 1913, ch. 64. Approved April 28, 1913.

Arizona.—R. S. 1901, Title XLIX. In effect September 1, 1901.

Arkansas.—Acts of 1913, ch. 81. Approved February 21, 1913.

California.—Laws of 1917, ch. 751. In effect July 31, 1917.

Colorado.—Laws of 1897, ch. 64. Approved April 20, 1897.

Connecticut.—Laws of 1897, ch. 74. Approved April 5, 1897.

Delaware.—Laws of 1911, ch. 191. Approved April 4, 1911.

District of Columbia.—Laws of 1899 (U. S. Stats.), ch. 47. In effect April 3, 1899.

Florida.—Laws of 1897, ch. 4524. Approved June 1, 1897.

Hawaii.—Laws of 1907, Act. 89. In effect April 20, 1907.

Idaho.—Laws of 1903, page 380. In effect March 10, 1903.

Illinois.—Laws of 1907, page 403. Approved June 5, 1907.*

Indiana.—Laws of 1913, ch. 63. Approved March 3, 1913.

Iowa.—Laws of 1902, ch. 130. Approved April 12, 1902.

Kansas.—Laws of 1905, ch. 310. In effect June 8, 1905.

Kentucky.—Acts 1904, ch. 102. Approved March 24, 1904.

Louisiana.—Laws of 1904, Act. 64. Approved June 29, 1904.

Maine.—Laws of 1917, ch. 257. Approved April 7, 1917.

Maryland.—Laws of 1898, ch. 119. Approved March 29, 1898.

Massachusetts.—Laws of 1898, ch. 533. In effect January 1, 1899.

Massachusetts.—Laws of 1899, ch. 130. In effect March 6, 1899.

Michigan.—Public Acts 1905, page 389. Approved June 16, 1905.

Minnesota.—Laws of 1913, ch. 272. In effect July 1, 1913.

Mississippi.—Laws of 1916, ch. 244. In effect July 7, 1916.

Missouri.—Laws of 1905, page 243. Approved April 10, 1905. In effect June 16, 1905 (see Nat. Bank of Commerce v. Mechanics' Am. Nat. Bank, 127 S. W. 429).

Montana.—Laws of 1903, ch. 121. In effect March 7, 1903.

Nebraska.—Laws of 1905, ch. 83. In effect August 1, 1905.

Nevada.—Laws of 1907, ch. 62. In effect May 1, 1907.

New Hampshire.—Laws of 1909, ch. 128. In effect January 1, 1910.

New Jersey.—Laws of 1902, ch. 184. Approved April 4, 1902.

New Mexico.—Laws of 1907, ch. 83. Approved March 21, 1907.

New York.—Laws of 1897, ch. 612. Became a law May 19, 1897.

New York.—Laws of 1898, ch. 336. Became a law April 20, 1898.

North Carolina.—Laws of 1899, ch. 733. In effect March 8, 1899.

North Dakota.—Laws of 1899, ch. 113. Approved March 7, 1899.

* The amendments suggested by Professor Ames, in his articles, infra, pp. 418 et seq., to sections 9, 29, 34, 37, 40, 49, 64, 66, 68, 70, 119, 120, 137, and 186 of the Law, as recommended by the Commissioners, were adopted in whole or in part in the Illinois Act.

Ohio.—Laws of 1902, page 162. In effect January 1, 1903.

Oklahoma.—Laws of 1909, ch. 24. Approved March 20, 1909.

Oregon.—Laws of 1899, page 18. Approved February 16, 1899.

Pennsylvania.—Laws of 1901, page 194. In effect September 2, 1901.

Philippine Islands.—Acts of Philippine Commission, 1911, No. 2031. Enacted February 3, 1911, to take effect ninety days after publication.

Rhode Island.—Laws of 1899, ch. 674. In effect July 1, 1899.

South Carolina.—Laws of 1914, ch. 396. Vetoed by governor March 4, 1914. Passed over veto. Date of passage or time of taking effect not stated.

South Dakota.—Laws of 1913, ch. 279. Approved March 4, 1913.

Tennessee.—Laws of 1899, ch. 94. In effect May 16, 1899.

Texas.—General Laws 1919, p. 190. Approved March 24, 1919. In effect June 17, 1919.

Utah.—Laws of 1899, ch. 83. In effect July 1, 1899.

Vermont.—Laws of 1912, No. 99. In effect June 1, 1913.

Virginia.—Laws of 1897-8, ch. 866. Approved March 3, 1898.

Washington.—Laws of 1899, ch. 149. In effect March 22, 1899.

West Virginia.—Acts of 1907, ch. 81. In effect January 1, 1908.

Wisconsin.—Laws of 1899, ch. 356. In effect May 15, 1899.

Wyoming.—Laws of 1905, ch. 43. In effect February 15, 1905.

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In the following "Table of Corresponding Sections of the Law in the Various States and Territories" the section numbers are those of the latest revision or compilation of statutes in each state. Inasmuch as it is impracticable to compile a table which will cover all the revisions or compilations in each state, references to all the acts or compilations in which the Negotiable Instruments Law or parts thereof may be found, are included in the following lists:

I

(1) **Arizona.**—Rev. St. 1901, tit. 49; Laws of 1913, ch. 67; Rev. St. 1913, tit. 36.
(2) **Arkansas.**—Acts of 1913, ch. 81; Digest 1916, ch. 128.
(3) **California.**—Laws of 1917, ch. 751.
(4) **Colorado.**—Laws of 1897, ch. 64; Rev. St. 1908, ch. XCV; Mills' Ann. St. 1912, ch. 110.
(5) **Connecticut.**—Laws of 1897, ch. 74; Gen. St. 1902, ch. 234; Gen. St. 1918, ch. 225.
(6) **Delaware.**—Laws of 1911, ch. 191; Rev. Code 1915, ch. 78.
(7) **District of Columbia.**—Laws of 1899 (U. S. St. at Large), ch. 47; Code 1901, ch. XLVI; Ford's Ann. Code 1910, p. 350; Code 1911, ch. XLVI.
(8) **Florida.**—Laws of 1897, ch. 4524; Gen. St. 1906, p. 1147; Comp. Laws 1914, II, p. 1550.
(9) **Hawaii.**—Laws of 1907, Act 89; Rev. Laws 1915, ch. 196.
(10) **Idaho.**—Laws of 1903, p. 380; Rev. Code 1908, I, p. 1236.
(11) **Illinois.**—Laws of 1907, p. 403; Hurd's Rev. St. 1913, ch. 98; Hurd's Rev. St. 1917, ch. 98.
(12) **Indiana.**—Laws of 1913, ch. 63; Burns' Ann. St. 1914, ch. 112, art. 2.
(13) **Kansas.**—Laws of 1905, ch. 310; Gen. St. 1909, ch. 84; Gen. St. 1915, ch. 82.
(14) **Kentucky.**—Laws of 1904, ch. 102; Carroll's St. 1915, ch. 90b, sec. 3720b.
(15) **Louisiana.**—Laws of 1904, Act 64; Marr's Ann. Rev. St. 1915, p. 148.
(16) **Maryland.**—Laws of 1898, ch. 119; Pub. Gen. Laws 1904, art. 13; Pub. Gen. Laws 1911, art. 13.
(17) **Massachusetts.**—Laws of 1898, ch. 533; Rev. Laws 1899, ch. 130; Rev. Laws 1902, ch. 73; Laws of 1910, ch. 417.
(18) **Michigan.**—Pub. Acts 1905, No. 265; Howell's St. 1913, Vol. II, ch. 36; Comp. Laws 1915, ch. 119.
(19) **Minnesota.**—Laws of 1913, ch. 272; Gen. St. 1913.
(20) **Missouri.**—Laws of 1905, p. 243; Rev. St. 1909, ch. 86.
(21) **Montana.**—Laws of 1903, ch. 121; Rev. Civ. Code 1907, p. 1593, tit. XV.
(22) **Nebraska.**—Laws of 1905, ch. 83; Rev. St. 1913, ch. 54.

(23) Nevada.—Laws of 1907, ch. 62; Rev. Laws 1912, Vol. I, p. 769.
(24) New Hampshire.—Laws of 1909, ch. 123; Pub. St. Supp. 1913, p. 463.
(25) New York.—Laws of 1897, ch. 612; Laws of 1909, ch. 43; Consol. Laws 1909, ch. 38.
(26) North Carolina.—Laws of 1899, ch. 733; Rev. 1905, ch. 54; Rev. 1908, ch. 54.
(27) North Dakota.—Laws of 1899, ch. 113; Comp. Laws, 1913, ch. 103.
(28) Ohio.—Laws of 1902, p. 162; Gen. Code 1910, p. 1717; Ann. Gen. Code 1912, Tit. VII, Div. II, ch. 1 (Vol. III, p. 967).
(29) Oklahoma.—Laws of 1909, ch. 24; Rev. Laws 1910, ch. 49.
(30) Oregon.—Laws of 1899, p. 18; Lord's Laws 1910, Tit. XL, ch. 2.
(31) Rhode Island.—Laws of 1899, ch. 674; Gen. Laws 1909, Tit. XIX, ch. 200.
(32) South Dakota.—Laws of 1913, ch. 279; Comp. Laws 1913, Vol. II, p. 298.
(33) Tennessee.—Laws of 1899, ch. 94; Code Supp. 1903, sec. 3505; Ann. Code 1917, p. 2908.
(34) Utah.—Laws of 1899, ch. 83; Comp. Laws 1907, Tit. 53.
(35) Washington.—Laws of 1899, ch. 149; Rem. & Ball. Codes and St. 1909, Vol. II, p. 120; Rem. Codes and St. 1915, Vol. I, p. 1124.
(36) West Virginia.—Acts of 1907, ch. 81; Code Ann. 1913, ch. 98a.
(37) Wisconsin.—Laws of 1899, ch. 356; St. 1913, p. 1180; St. 1915, ch. 78.
(38) Wyoming.—Laws of 1905, ch. 43; Comp. St. 1910, ch. 210.

II

In the following states and territories the numbering of the sections is the same as that of the Commissioners' draft in the first column (X) of the following table:

Alabama.—Laws of 1907, p. 660; Code 1907, ch. 115; Laws of 1909, No. 146. The Act as originally adopted in 1907 was numbered 4958 to 5142, corresponding to numbers 1 to 196 of the Commissioners' draft. The Act of 1909 corrected errors in the Act of 1907 and numbered the Act as in the Commissioners' draft.
Alaska.—Laws of 1913, ch. 64.
Iowa.—Laws of 1902, ch. 130; Code Supp. 1913, Tit. XV, ch. 3-A, secs. 3060a1-3060a198.
Maine.—Laws of 1917, ch. 257.
Mississippi.—Laws of 1916, ch. 244. See also Hemingway's Ann. Code, 1917, pp. 1355-1385.
New Jersey.—Laws of 1902, ch. 184; Comp. St. 1911, Vol. III, p. 3732.
New Mexico.—Laws of 1907, ch. 83.
Pennsylvania.—Laws of 1901, No. 162; Laws of 1909, No. 169.
Philippine Islands.—Acts of Philippine Commission 1911, No. 2031.
South Carolina.—Laws of 1914, ch. 396.
Texas.—General Laws 1919, p. 190. Approved March 24, 1919. In effect June 17, 1919.
Vermont.—Laws of 1912, No. 99.
Virginia.—Laws of 1898, ch. 866; Laws of 1906, ch. 219; Code 1904, ch. 133a, sec. 2841a.

Table of Corresponding Sections of the Law in the Various States and Territories

X N.I.L.	1 Ariz.	2 Ark.	3 Cal.	4 Colo.	5 Conn.	6 Del.	7 D.C.	8 Fla.	9 Haw.	10 Ida.	11 Ill.	12 Ind.	13 Kan.
1	4146	6941	3082	5051	4359	2645	1305	2935	3451	3458	19	9089a	6528
2	4147	6942	3083	5052	4360	2646	1306	2936	3452	3459	20	9089b	6529
3	4148	6943	3084	5053	4361	2647	1307	2937	3453	3460	21	9089c	6530
4	4149	6944	3085	5054	4362	2648	1308	2938 / 2939	3454	3461	22	9089d	6531
5	4150	6945	3086	5055	4363	2649	1309	2939	3455	3462	23	9089e	6532
6	4151	6946	3087	5056	4364	2650	1310	2940	3456	3463	24	9089f	6533
7	4152	6947	3088	5057	4365	2651	1312	2941	3457	3464	25	9089g	6534
8	4153	6948	3089	5058	4366	2652	1312	2942	3458	3465	26	9089h	6535
9	4154	6949	3090	5059	4367	2653	1313	2943	3459	3466	27	9089i	6536
10	4155	6950	3091	5060	4368	2654	1314	2944	3460	3467	28	9089j	6537
11	4156	6951	3092	5061	4369	2655	1315	2945	3461	3468	29	9089k	6538
12	4157	6952	3093	5062	4370	2656	1316	2946	3462	3469	30	9089l	6539
13	4158	6953	3094	5063	4371	2657	1317	2947	3463	3470	31	9089m	6540
14	4159	6954	3095	5064	4372	2658	1318	2948	3464	3471	32	9089n	6541
15	4160	6955	3096	5065	4373	2659	1319	2949	3465	3472	33	9089o	6542
16	4161	6956	3097	5066	4374	2660	1320	2950	3466	3473	34	9089p	6543
17	4162	6957	3098	5067	4375	2661	1321	2951	3467	3474	35	9089q	6544
18	4163	6958	3099	5068	4376	2662	1322	2952	3468	3475	36	9089r	6545
19	4164	6959	3100	5069	4377	2663	1323	2953	3469	3476	37	9089s	6546
20	4165	6960	3101	5070	4378	2664	1324	2954	3470	3477	38	9089t	6547
21	4166	6961	3102	5071	4379	2665	1325	2955	3471	3478	39	9089u	6548
22	4167	6962	3103	5072	4380	2666	1326	2956	3472	3479	40	9089v	6549
23	4168	6963	3104	5073	4381	2667	1327	2957	3473	3480	41	9089w	6550
24	4169	6964	3105	5074	4382	2668	1328	2958	3474	3481	42	9089x	6551
25	4170	6965	3106	5075	4383	2669	1329	2959	3475	3482	43	9089y	6552
26	4171	6966	3107	5076	4384	2670	1330	2960	3476	3483	44	9089z	6553
27	4172	6967	3108	5077	4385	2671	1331	2961	3477	3484	45	9089a1	6554
28	4173	6968	3109	5078	4386	2672	1332	2962	3478	3485	46	9089b1	6555
29	4174	6969	3110	5079	4387	2673	1333	2963	3479	3486	47	9089c1	6556
30	4175	6970	3111	5080	4388	2674	1334	2964	3480	3487	48	9089d1	6557
31	4176	6971	3112	5081	4389	2675	1335	2965	3481	3488	49	9089e1	6558
32	4177	6972	3113	5082	4390	2676	1336	2966	3482	3489	50	9089f1	6559
33	4178	6973	3114	5083	4391	2677	1337	2967	3483	3490	51	9089g1	6560
34	4179	6974	3115	5084	4392	2678	1338	2968	3484	3491	52	9089h1	6561
35	4180	6575	3116	5085	4393	2679	1339	2969	3485	3492	53	9089i1	6562

X N.I.L.	1 Ariz.	2 Ark.	3 Cal.	4 Colo.	5 Conn.	6 Del.	7 D.C.	8 Fla.	9 Haw.	10 Ida.	11 Ill.	12 Ind.	13 Kan.
36	4181	6976	3117	5086	4394	2680	1340	2970	3486	3493	54	9089j1	6563
37	4182	6977	3118	5087	4395	2681	1341	2971	3487	3494	55	9089k1	6564
38	4183	6978	3119	5088	4396	2682	1342	2972	3488	3495	56	9089l1	6565
39	4184	6979	3120	5089	4397	2683	1343	2973	3489	3496	57	9089m1	6566
40	4185	6980	3121	5090	4398	2684	1344	2974	3490	3497	58	9089n1	6567
41	4186	6981	3122	5091	4399	2685	1345	2975	3491	3498	59	9089o1	6568
42	4187	6982	3123	5092	4400	2686	1346	2976	3492	3499	60	9089p1	6570
43	4188	6983	3124	5093	4401	2687	1347	2977	3493	3500	61	9089q1	6570
44	4189	6984	3125	5094	4402	2688	1348	2978	3494	3501	62	9089r1	6571
45	4190	6985	3126	5095	4403	2689	1349	2979	3495	3502	63	9089s1	6572
46	4191	6986	3127	5096	4404	2690	1350	2979	3496	3503	64	9089t1	6573
47	4192	6987	3128	5097	4405	2691	1351	2980	3497	3504	65	9089u1	6574
48	4193	6988	3129	5098	4406	2692	1352	2981	3498	3505	66	9089v1	6575
49	4194	6989	3130	5099	4407	2693	1353	2982	3499	3506	67	9089w1	6576
50	4195	6990	3131	5100	4408	2694	1354	2983	3500	3507	68	9089x1	6577
51	4196	6991	3132	5101	4409	2695	1355	2984	3501	3508	69	9089y1	6578
52	4197	6992	3133	5102	4410	2696	1356	2985	3502	3509	70	9089z1	6579
53	4198	6993	3134	5103	4411	2697	1357	2986	3503	3510	71	9089a2	6580
54	4199	6994	3135	5104	4412	2698	1358	2987	3504	3511	72	9089b2	6581
55	4200	6995	3136	5105	4413	2699	1359	2988	3505	3512	73	9089c2	6582
56	4201	6996	3137	5106	4414	2700	1360	2989	3506	3513	74	9089d2	6583
57	4202	6997	3138	5107	4415	2701	1361	2990	3507	3514	75	9089e2	6584
58	4203	6998	3139	5108	4416	2702	1362	2991	3508	3515	76	9089f2	6585
59	4204	6999	3140	5109	4417	2703	1363	2992	3509	3516	77	9089g2	6586
60	4205	7000	3141	5110	4418	2704	1364	2993	3510	3517	78	9089h2	6587
61	4206	7001	3142	5111	4419	2705	1365	2994	3511	3518	79	9089i2	6588
62	4207	7002	3143	5112	4420	2706	1366	2995	3512	3519	80	9089j2	6589
63	4208	7003	3144	5113	4421	2707	1367	2996	3513	3520	81	9089k2	6590
64	4209	7004	3145	5114	4422	2708	1368	2997	3514	3521	82	9089l2	6591
65	4210	7005	3146	5115	4423	2709	1369	2998	3515	3522	83	9089m2	6592
66	4211	7006	3147	5116	4424	2710	1370	2999	3516	3523	84	9089n2	6593
67	4212	7007	3148	5117	4425	2711	1371	3000	3517	3524	85	9089o2	6594
68	4213	7008	3149	5118	4426	2712	1372	3001	3518	3525	86	9089p2	6595
69	4214	7009	3150	5119	4427	2713	1373	3002	3519	3526	87	9089q2	6596
70	4215	7010	3151	5120	4428	2714	1374	3003	3520	3527	88	9089r2	6597
71	4216	7011	3152	5121	4429	2715	1375	3004	3521	3528	89	9089s2	6598
72	4217	7012	3153	5122	4430	2716	1376	3005	3522	3529	90	9089t2	6599
73	4218	7013	3154	5123	4431	2717	1377	3006	3523	3530	91	9089u2	6600
74	4219	7014	3155	5124	4432	2718	1378	3007	3524	3531	92	9089v2	6601
75	4220	7015	3156	5125	4433	2719	1379	3008	3525	3532	93	9089w2	6602
76	4221	7016	3157	5126	4434	2720	1380	3009	3526	3533	94	9089x2	6603
77	4222	7017	3158	5127	4435	2721	1381	3010	3527	3534	95	9089y2	6604
78	4223	7018	3159	5128	4436	2722	1382	3011	3528	3535	96	9089z2	6605
79	4224	7019	3160	5129	4437	2723	1383	3012	3529	3536	97	9089a3	6606
80	4225	7020	3161	5130	4438	2724	1384	3012	3530	3537	98	9089b3	6607

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81	4226	7021	3162	5131	4439	2725	1385	3013	3531	3538	99	9089c3	6608
82	4227	7022	3163	5132	4440	2726	1386	3014	3532	3539	100	9089d3	6609
83	4228	7023	3164	5133	4441	2727	1387	3015	3533	3540	101	9089e3	6610
84	4229	7024	3165	5134	4442	2728	1388	3016	3534	3541	102	9089f3	6611
85	4230	7025	3166	5135	4443	2729	1389	3017	3535	3542	103	9089g3	6612
86	4231	7026	3167	5136	4444	2730	1390	3017	3536	3543	104	9089h3	6614
87	4232	7027	3168	5137	4445	2731	1391	3018	3537	3544	....	9089i3	....
88	4233	7028	3169	5188	4446	2732	1392	3019	3538	3545	105	9089j3	6616
89	4234	7029	3170	5139	4447	2733	1393	3020	3539	3546	106	9089k3	6617
90	4235	7030	3171	5140	4448	2734	1394	3021	3540	3547	107	9089l3	6618
91	4236	7031	3172	5141	4449	2735	1395	3022	3541	3548	108	9089m3	6619
92	4237	7032	3173	5142	4450	2736	1396	3023	3542	3549	109	9089n3	6620
93	4238	7033	3174	5143	4451	2737	1397	3024	3543	3550	110	9089o3	6621
94	4239	7034	3175	5144	4452	2738	1398	3025	3544	3551	111	9089p3	6622
95	4240	7035	3176	5145	4453	2739	1399	3026	3545	3552	112	9089q3	6623
96	4241	7036	3177	5146	4454	2740	1400	3027	3546	3553	113	9089r3	6624
97	4242	7037	3178	5147	4455	2741	1401	3027	3547	3554	114	9089s3	6625
98	4243	7038	3179	5148	4456	2742	1402	3028	3548	3555	115	9089t3	6626
99	4244	7039	3180	5149	4457	2743	1403	3029	3549	3556	116	9089u3	6627
100	4245	7040	3181	5150	4458	2744	1404	3029	3550	3557	117	9089v3	6628
101	4246	7041	3182	5151	4459	2745	1405	3030	3551	3558	118	9089w3	6629
102	4247	7042	3183	5152	4460	2746	1406	3031	3552	3559	119	9089x3	6630
103	4248	7043	3184	5153	4461	2747	1407	3031	3553	3560	120	9089y3	6631
104	4249	7044	3185	5154	4462	2748	1408	3032	3554	3561	121	9089z3	6632
105	4250	7045	3186	5155	4463	2749	1409	3033	3555	3562	122	9089a4	6633
106	4251	7046	3187	5156	4464	2750	1410	3033	3556	3563	123	9089b4	6634
107	4252	7047	3188	5157	4465	2751	1411	3034	3557	3564	124	9089c4	6635
108	4253	7048	3189	5158	4466	2752	1412	3035	3558	3565	125	9089d4	6636
109	4254	7049	3190	5159	4467	2753	1413	3036	3559	3566	126	9089e4	6637
110	4255	7050	3191	5160	4468	2754	1414	3036	3560	3567	127	9089f4	6638
111	4256	7051	3192	5161	4469	2755	1415	3036	3561	3568	128	9089g4	6639
112	4257	7052	3193	5162	4470	2756	1416	3037	3562	3569	129	9089h4	6640
113	4258	7053	3194	5163	4471	2757	1417	3038	3563	3570	130	9089i4	6641
114	4259	7054	3195	5164	4472	2758	1418	3039	3564	3571	131	9089j4	6642
115	4260	7055	3196	5165	4473	2759	1419	3039	3565	3572	132	9089k4	6643
116	4261	7056	3197	5166	4474	2760	1420	3039	3566	3573	133	9089l4	6644
117	4262	7057	3198	5167	4475	2761	1421	3040	3567	3574	134	9089m4	6645
118	4263	7058	3199	5168	4476	2762	1422	3041	3568	3575	135	9089n4	6646
119	4264	7059	3200	5169	4477	2763	1423	3042	3569	3576	136	9089o4	6647
120	4265	7060	3201	5170	4478	2764	1424	3042	3570	3577	137	9089p4	6648
121	4266	7061	3202	5171	4479	2765	1425	3043	3571	3578	138	9089q4	6649
122	4267	7062	3203	5172	4480	2766	1426	3044	3572	3579	139	9089r4	6650
123	4268	7063	3204	5173	4481	2767	1427	3045	3573	3580	140	9089s4	6651
124	4269	7064	3205	5174	4482	2768	1428	3046	3574	3581	141	9089t4	6652
125	4270	7065	3206	5175	4483	2769	1429	3046	3575	3582	142	9089u4	6653

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126	4271	7066	3207	5176	4484	2770	1430	3047	3576	3583	143	9089v4	6654
127	4272	7067	3208	5177	4485	2771	1431	3047	3577	3584	144	9089w4	6655
128	4273	7068	3209	5178	4486	2772	1432	3047	3578	3585	145	9089x4	6656
129	4274	7069	3210	5179	4487	2773	1433	3048	3579	3586	146	9089y4	6657
130	4275	7070	3211	5180	4488	2774	1434	3049	3580	3587	147	9089z4	6658
131	4276	7071	3212	5181	4489	2775	1435	3050	3581	3588	148	9089a5	6659
132	4277	7072	3213	5182	4490	2776	1436	3051	3582	3589	149	9089b5	6660
133	4278	7073	3214	5183	4491	2777	1437	3051	3583	3590	150	9089c5	6661
134	4279	7074	3215	5184	4492	2778	1438	3051	3584	3591	151	9089d5	6662
135	4280	7075	3216	5185	4493	2779	1439	3052	3585	3592	152	9089e5	6663
136	4281	7076	3217	5186	4494	2780	1440	3053	3586	3593	153	9089f5	6664
137	4282	7077	3218	5187	4495	2781	1441	3054	3587	3594	....	9089g5	6665
138	4283	7078	3219	5188	4496	2782	1442	3055	3588	3595	155	9089h5	6666
139	4284	7079	3220	5189	4497	2783	1443	3056	3589	3596	156	9089i5	6667
140	4285	7080	3221	5190	4498	2784	1444	3056	3590	3597	157	9089j5	6668
141	4286	7081	3222	5191	4499	2785	1445	3056	3591	3598	158	9089k5	6669
142	4287	7082	3223	5192	4500	2786	1446	3057	3592	3599	159	9089l5	6670
143	4288	7083	3224	5193	4501	2787	1447	3058	3593	3600	160	9089m5	6671
144	4289	7084	3225	5194	4502	2788	1448	3059	3594	3601	161	9089n5	6672
145	4290	7085	3226	5195	4503	2789	1449	3060	3595	3602	162	9089o5	6673
146	4291	7086	3227	5196	4504	2790	1450	3061	3596	3603	163	9089p5	6674
147	4292	7087	3228	5197	4505	2791	1451	3062	3597	3604	164	9089q5	6675
148	4293	7088	3229	5198	4506	2792	1452	3062	3598	3605	165	9089r5	6676
149	4294	7089	3230	5199	4507	2793	1453	3063	3599	3606	166	9089s5	6677
150	4295	7090	3231	5200	4508	2794	1454	3063	3600	3607	167	9089t5	6678
151	4296	7091	3232	5201	4509	2795	1455	3064	3601	3608	168	9089u5	6679
152	4297	7092	3233	5202	4510	2796	1456	3065	3602	3609	169	9089v5	6680
153	4298	7093	3234	5203	4511	2797	1457	3066	3603	3610	170	9089w5	6681
154	4299	7094	3235	5204	4512	2798	1458	3066	3604	3611	171	9089x5	6682
155	4300	7095	3236	5205	4513	2799	1459	3067	3605	3612	172	9089y5	6683
156	4301	7096	3237	5206	4514	2800	1460	3067	3606	3613	173	9089z5	6684
157	4302	7097	3238	5207	4515	2801	1461	3068	3607	3614	174	9089a6	6685
158	4303	7098	3239	5208	4516	2802	1462	3069	3608	3615	175	9089b6	6686
159	4304	7099	3240	5209	4517	2803	1463	3070	3609	3616	176	9089c6	6687
160	4305	7100	3241	5210	4518	2804	1464	3071	3610	3617	177	9089d6	6688
161	4306	7101	3242	5211	4519	2805	1465	3073	3611	3618	178	9089e6	6689
162	4307	7102	3243	5212	4520	2806	1466	3074	3612	3619	179	9089f6	6690
163	4308	7103	3244	5213	4521	2807	1467	3075	3613	3620	180	9089g6	6691
164	4309	7104	3245	5214	4522	2808	1468	3076	3614	3621	181	9089h6	6692
165	4310	7105	3246	5215	4523	2809	1469	3076	3615	3622	182	9089i6	6693
166	4311	7106	3247	5216	4524	2810	1470	3077	3616	3623	183	9089j6	6694
167	4312	7107	3248	5217	4525	2811	1471	3078	3617	3624	184	9089k6	6695
168	4313	7108	3249	5218	4526	2812	1472	3079	3618	3625	185	9089l6	6696
169	4314	7109	3250	5219	4527	2813	1473	3080	3619	3626	186	9089m6	6697
170	4315	7110	3251	5220	4528	2814	1474	3081	3620	3627	187	9089n6	6698

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171	4316	7111	3252	5221	4529	2815	1475	3082	3621	3628	188	9089o6	6699
172	4317	7112	3253	5222	4530	2816	1476	3082	3622	3629	189	9089p6	6700
173	4318	7113	3254	5223	4531	2817	1477	3083	3623	3630	190	9089q6	6701
174	4319	7114	3255	5224	4532	2818	1478	3084	3624	3631	191	9089r6	6702
175	4320	7115	3256	5225	4533	2819	1479	3085	3625	3632	192	9089s6	6703
176	4321	7116	3257	5226	4534	2820	1480	3086	3626	3633	193	9089t6	6704
177	4322	7117	3258	5227	4535	2821	1481	3086	3627	3634	194	9089u6	6705
178	4323	7118	3259	5228	4536	2822	1482	3087	3628	3635	195	9089v6	6706
179	4324	7119	3260	5229	4537	2823	1483	3088	3629	3636	196	9089w6	6707
180	4325	7120	3261	5230	4538	2824	1484	3089	3630	3637	197	9089x6	6708
181	4326	7121	3262	5231	4539	2825	1485	3090	3631	3638	198	9089y6	6709
182	4327	7122	3263	5232	4540	2826	1486	3091	3632	3639	199	9089z6	6710
183	4328	7123	3264	5233	4541	2827	1487	3092	3633	3640	200	9089a7	6711
184	4329	7129	3265	5234	4542	2828	1488	3093	3634	3641	201	9089b7	6712
185	4330	7130	3265a	5235	4543	2829	1489	3094	3635	3642	202	9089c7	6713
186	4331	7131	3265b	5236	4544	2830	1490	3095	3636	3643	203	9089d7	6714
187	4332	7132	3265c	5237	4545	2831	1491	3096	3637	3644	204	9089e7	6715
188	4333	7133	3265d	5238	4546	2832	1492	3097	3638	3645	205	9089f7	6716
189	4334	7134	3265e	5239	4547	2833	1493	3098	3639	3646	206	9089g7	6717
190	....	6934	.....	5240	....	2834	....	2934	3640	3647	207	9089h7	6521
191	4335	6935	3266	5241	4358	2835	1304	2934	3641	3648	208	9089i7	6522
192	4336	6936	3266a	5242	4358	2836	1304	2934	3642	3649	209	9089j7	6523
193	4337	6937	3266b	5243	4358	2837	1304	2934	3643	3650	210	9089k7	6524
194	4338	6938	3266c	5244	4358	2838	1304	2934	3644	3651	211	9089l7	6525
195	....	6939	3266d	5245	4358	2839	1304	....	3645	3652	212	9089m7	6526
196	4339	6940	3266d	5246	4358	2840	1304	2934	3646	3653	213	9089n7	6527
197	....	....	.....	....	....	....	....	....	....	....	214	.....	....
198	....	....	.....	....	....	....	....	....	....	....	....	.....	....

(X) See *supra*, page xlix.
(1) Rev. St. 1913, tit. 36.
(2) Digest 1916, ch. 128.
(3) Laws 1917, ch. 751.
(4) Mill's Ann. St. 1912, ch. 110.
(5) Gen. St. 1918, tit. 38, ch. 225.
(6) Rev. Code 1915, ch. 78.
(7) Code 1917, ch. XLVI.
(8) Comp. Laws 1914, II, p. 1550.
(9) Rev. Laws 1915, tit. XXIX, ch. 196.
(10) Rev. Codes, 1908, tit. 13.
(11) Hurd's Rev. St. 1917, ch. 98.
(12) Burns' Ann. St. 1914, Vol. 4, ch. 112, art. 2, p. 557.
(13) Gen. St. 1915, ch. 82.

X N.I.L.	14 Ky.	15 La.	16 Md.	17 Mass	18 Mich.	19 Minn.	20 Mo.	21 Mont	22 Neb.	23 Nev.	24 N.H.	25 N.Y.	26 N.C.
1	1	440	20	18	3	5813	9972	5849	5319	2548	1	20	2151
2	2	441	21	19	4	5814	9973	5850	5320	2549	2	21	2152
3	3	442	22	20	5	5815	9974	5851	5321	2550	3	22	2153
4	4	443	23	21	6	5816	9975	5852	5322	2551	4	23	2156
5	5	444	24	22	7	5817	9976	5853	5323	2552	5	24	2154
6	6	445	25	23	8	5818	9977	5854	5324	2553	6	25	2155
7	7	446	26	24	9	5819	9978	5855	5325	2554	7	26	2157
8	8	447	27	25	10	5820	9979	5856	5326	2555	8	27	2158
9	9	448	28	26	11	5821	9980	5857	5327	2556	9	28	2159
10	10	449	29	27	12	5822	9981	5858	5328	2557	10	29	2160
11	11	450	30	28	13	5823	9982	5859	5329	2558	11	30	2161
12	12	451	31	29	14	5824	9983	5860	5330	2559	12	31	2162
13	13	452	32	30	15	5825	9984	5861	5331	2560	13	32	2163
14	14	453	33	31	16	5826	9985	5862	5332	2561	14	33	2164
15	15	454	34	32	17	5827	9986	5863	5333	2562	15	34	2165
16	16	455	35	33	18	5828	9987	5864	5334	2563	16	35	2166
17	17	456	36	34	19	5829	9988	5865	5335	2564	17	36	2341
18	18	457	37	35	20	5830	9989	5866	5336	2565	18	37	2167
19	19	458	38	36	21	5831	9990	5867	5337	2566	19	38	2168
20	20	459	39	37	22	5832	9991	5868	5338	2567	20	39	2169
21	21	460	40	38	23	5833	9992	5869	5339	2568	21	40	2170
22	22	461	41	39	24	5834	9993	5870	5340	2569	22	41	2180
23	23	462	42	40	25	5835	9994	5871	5341	2570	23	42	2171
24	24	463	43	41	26	5836	9995	5872	5342	2571	24	50	2172
25	25	464	44	42	27	5837	9996	5873	5343	2572	25	51	2173
26	26	465	45	43	28	5838	9997	5874	5344	2573	26	52	2174
27	27	466	46	44	29	5839	9998	5875	5345	2574	27	53	2175
28	28	467	47	45	30	5840	9999	5876	5346	2575	28	54	2176
29	29	468	48	46	31	5841	10000	5877	5347	2576	29	55	2177
30	30	469	49	47	32	5842	10001	5878	5348	2577	30	60	2178
31	31	470	50	48	33	5843	10002	5879	5349	2578	31	61	2179
32	32	471	51	49	34	5844	10003	5880	5350	2579	32	62	2181
33	33	472	52	50	35	5845	10004	5881	5351	2580	33	63	2182
34	34	473	53	51	36	5846	10004	5882	5352	2581	34	64	2183
35	35	474	54	52	37	5847	10005	5883	5353	2582	35	65	2184

X	14	15	16	17	18	19	20	21	22	23	24	25	26
N.I.L.	Ky.	La.	Md.	Mass	Mich.	Minn.	Mo.	Mont	Neb.	Nev.	N.H.	N.Y.	N.C.
36	36	475	55	53	38	5848	10006	5884	5354	2583	36	66	2185
37	37	476	56	54	39	5849	10007	5885	5355	2584	37	67	2186
38	38	477	57	55	40	5850	10008	5886	5356	2585	38	68	2187
39	39	478	58	56	41	5851	10009	5887	5357	2586	39	69	2188
40	40	479	59	57	42	5852	10010	5888	5358	2587	40	70	2189
41	41	480	60	58	43	5853	10011	5889	5359	2588	41	71	2190
42	42	481	61	57	44	5854	10012	5890	5360	2589	42	72	2191
43	43	482	62	60	45	5855	10013	5891	5361	2590	43	73	2192
44	44	483	63	61	46	5856	10014	5892	5362	2591	44	74	2193
45	45	484	64	62	47	5857	10015	5893	5363	2592	45	75	2194
46	46	485	65	63	48	5858	10016	5894	5364	2593	46	76	2195
47	47	486	66	64	49	5859	10017	5895	5365	2594	47	77	2196
48	48	487	67	65	50	5860	10018	5896	5366	2595	48	78	2197
49	49	488	68	66	51	5861	10019	5897	5267	2596	49	79	2198
50	50	489	69	67	52	5862	10020	5898	5368	2597	50	80	2199
51	51	490	70	68	53	5863	10021	5899	5369	2598	51	90	2200
52	52	491	71	69	54	5864	10022	5900	5370	2599	52	91	2201
53	53	492	72	70	55	5865	10023	5901	5371	2600	53	92	2202
54	54	493	73	71	56	5866	10024	5902	5372	2601	54	93	2203
55	55	494	74	72	57	5867	10025	5903	5373	2602	55	94	2204
56	56	495	75	73	58	5868	10026	5904	5374	2603	56	95	2205
57	57	496	76	74	59	5869	10027	5905	5375	2604	57	96	2206
58	58	497	77	75	60	5870	10028	5906	5376	2605	58	97	2207
59	59	498	78	76	61	5871	10029	5907	5377	2606	59	98	2208
60	60	499	79	77	62	5872	10030	5908	5378	2607	60	110	2209
61	61	500	80	78	63	5873	10031	5909	5379	2608	61	111	2210
62	62	501	81	79	64	5874	10032	5910	5380	2609	62	112	2211
63	63	502	82	80	65	5875	10033	5911	5381	2610	63	113	2212
64	64	503	83	81	66	5876	10034	5912	5382	2611	64	114	2213
65	65	504	84	82	67	5877	10035	5913	5383	2612	65	115	2214
66	66	505	85	83	68	5878	10036	5914	5384	2613	66	116	2215
67	67	506	86	84	69	5879	10037	5915	5385	2614	67	117	2216
68	68	507	87	85	70	5880	10038	5916	5386	2615	68	118	2217
69	69	508	88	86	71	5881	10039	5917	5387	2616	69	119	2218
70	70	509	89	87	72	5882	10040	5918	5388	2617	70	130	2219
71	71	510	90	88	73	5883	10041	5919	5389	2618	71	131	2220
72	72	511	91	89	74	5884	10042	5920	5390	2619	72	132	2221
73	73	512	92	90	75	5885	10043	5921	5391	2620	73	133	2222
74	74	513	93	91	76	5886	10044	5922	5392	2621	74	134	2223
75	75	514	94	92	77	5887	10045	5923	5393	2622	75	135	2224
76	76	515	95	93	78	5888	10046	5924	5394	2623	76	136	2225
77	77	516	96	94	79	5889	10047	5925	5395	2624	77	137	2226
78	78	517	97	95	80	5890	10048	5926	5396	2625	78	138	2227
79	79	518	98	96	81	5891	10049	5927	5397	2626	79	139	2228
80	80	519	99	97	82	5892	10050	5928	5398	2627	80	140	2229

X N.I.L.	14 Ky.	15 La.	16 Md.	17 Mass	18 Mich.	19 Minn.	20 Mo.	21 Mont	22 Neb.	23 Nev.	24 N.H.	25 N.Y.	26 N.C.
81	81	520	100	98	83	5893	10051	5929	5399	2628	81	141	2230
82	82	521	101	99	84	5894	10052	5930	5400	2629	82	142	2231
83	83	522	102	100	85	5895	10053	5931	5401	2630	83	143	2232
84	84	523	103	101	86	5896	10054	5932	5402	2631	84	144	2233
85	85	524	104	102	87	5897	10055	5933	5403	2632	85	145	2234
86	86	525	105	103	88	5898	10056	5934	5404	2633	86	146	2236
87	87	526	106	104	89	5899	10057	5935	....	2634	87	147	2237
88	88	527	107	105	90	5900	10058	5936	5405	2635	88	148	2238
89	89	528	108	106	91	5901	10059	5937	5406	2636	89	160	2239
90	90	529	109	107	92	5902	10060	5938	5407	2637	90	161	2240
91	91	530	110	108	93	5903	10061	5939	5408	2638	91	162	2241
92	92	531	111	109	94	5904	10062	5940	5409	2639	92	163	2242
93	93	532	112	110	95	5905	10063	5941	5410	2640	93	164	2243
94	94	533	113	111	96	5906	10064	5942	5411	2641	94	165	2244
95	95	534	114	112	97	5907	10065	5943	5412	2642	95	166	2245
96	96	535	115	113	98	5908	10066	5944	5413	2643	96	167	2246
97	97	536	116	114	99	5909	10067	5945	5414	2644	97	168	2247
98	98	537	117	115	100	5910	10068	5946	5415	2645	98	169	2248
99	99	538	118	116	101	5911	10069	5947	5416	2646	99	170	2249
100	100	539	119	117	102	5912	10070	5948	5417	2647	100	171	2250
101	101	540	120	118	103	5913	10071	5949	5418	2648	101	172	2251
102	102	541	121	119	104	5914	10072	5950	5419	2649	102	173	2252
103	103	542	122	120	105	5915	10073	5951	5420	2650	103	174	2253
104	104	543	123	121	106	5916	10074	5952	5421	2651	104	175	2254
105	105	544	124	122	107	5917	10075	5953	5422	2652	105	176	2255
106	106	545	125	123	108	5918	10076	5954	5423	2653	106	177	2256
107	107	546	126	124	109	5919	10077	5955	5424	2654	107	178	2257
108	108	547	127	125	110	5920	10078	5956	5425	2655	108	179	2258
109	109	548	128	126	111	5921	10079	5957	5426	2656	109	180	2259
110	110	549	129	127	112	5922	10080	5958	5427	2657	110	181	2260
111	111	550	130	128	113	5923	10081	5959	5428	2658	111	182	2261
112	112	551	131	129	114	5924	10082	5960	5429	2659	112	183	2262
113	113	552	132	130	115	5925	10083	5961	5430	2660	113	184	2263
114	114	553	133	131	116	5926	10084	5962	5431	2661	114	185	2264
115	115	554	134	132	117	5927	10085	5963	5432	2662	115	186	2265
116	116	555	135	133	118	5928	10086	5964	5433	2663	116	187	2266
117	117	556	136	134	119	5929	10087	5965	5434	2664	117	188	2267
118	118	557	137	135	120	5930	10088	5966	5435	2665	118	189	2268
119	119	558	138	136	121	5931	10089	5967	5436	2666	119	200	2269
120	120	559	139	137	122	5932	10090	5968	5437	2667	120	201	2270
121	121	560	140	138	123	5933	10091	5969	5438	2668	121	202	2271
122	122	561	141	139	124	5934	10092	5970	5439	2669	122	203	2272
123	123	562	142	140	125	5935	10093	5971	5440	2670	123	204	2273
124	124	563	143	141	126	5936	10094	5972	5441	2671	124	205	2274
125	125	564	144	142	127	5937	10095	5973	5442	2672	125	206	2275

X N.I.L.	14 Ky.	15 La.	16 Md.	17 Mass	18 Mich.	19 Minn.	20 Mo.	21 Mont	22 Neb.	23 Nev.	24 N.H.	25 N.Y.	26 N.C.
126	126	565	145	143	128	5938	10096	5974	5443	2673	126	210	2276
127	127	566	146	144	129	5939	10097	5975	5444	2674	127	211	2277
128	128	567	147	145	130	5940	10098	5976	5445	2675	128	212	2278
129	129	568	148	146	131	5941	10099	5977	5446	2676	129	213	2279
130	130	569	149	147	132	5942	10100	5978	5447	2677	130	214	2280
131	131	570	150	148	133	5943	10101	5979	5448	2678	131	215	2281
132	132	571	151	149	134	5944	10102	5980	5449	2679	132	220	2282
133	133	572	152	150	135	5945	10103	5981	5450	2680	133	221	2283
134	134	573	153	151	136	5946	10104	5982	5451	2681	134	222	2284
135	135	574	154	152	137	5947	10105	5983	5452	2682	135	223	2285
136	136	575	155	153	138	5948	10106	5984	5453	2683	136	224	2286
137	137	576	156	154	139	5949	10107	5985	5454	2684	137	225	2287
138	138	577	157	155	140	5950	10108	5986	5455	2685	138	226	2288
139	139	578	158	156	141	5951	10109	5987	5456	2686	139	227	2289
140	140	579	159	157	142	5952	10110	5988	5457	2687	140	228	2290
141	141	580	160	158	143	5953	10111	5989	5458	2688	141	229	2291
142	142	581	161	159	144	5954	10112	5990	5459	2689	142	230	2292
143	143	582	162	160	145	5955	10113	5991	5460	2690	143	240	2293
144	144	583	163	161	146	5956	10114	5992	5461	2691	144	241	2294
145	145	584	164	162	147	5957	10115	5993	5462	2692	145	242	2295
146	146	585	165	163	148	5958	10116	5994	5463	2693	146	243	2296
147	147	586	166	164	149	5959	10117	5995	5464	2694	147	244	2297
148	148	587	167	165	150	5960	10118	5996	5465	2695	148	245	2298
149	149	588	168	166	151	5961	10119	5997	5466	2696	149	246	2299
150	150	589	169	167	152	5962	10120	5998	5467	2697	150	247	2300
151	151	590	170	168	153	5963	10121	5999	5468	2698	151	248	2301
152	152	591	171	169	154	5964	10122	6000	5469	2699	152	260	2302
153	153	592	172	170	155	5965	10123	6001	5470	2700	153	261	2303
154	154	593	173	171	156	5966	10124	6002	5471	2701	154	262	2304
155	155	594	174	172	157	5967	10125	6003	5472	2702	155	263	2305
156	156	595	175	173	158	5968	10126	6004	5473	2703	156	264	2306
157	157	596	176	174	159	5969	10127	6005	5474	2704	157	265	2307
158	158	597	177	175	160	5970	10128	6006	5475	2705	158	266	2308
159	159	598	178	176	161	5971	10129	6007	5476	2706	159	267	2309
160	160	599	179	177	162	5972	10130	6008	5477	2707	160	268	2310
161	161	600	180	178	163	5973	10131	6009	5478	2708	161	280	2311
162	162	601	181	179	164	5974	10132	6010	5479	2709	162	281	2312
163	163	602	182	180	165	5975	10133	6011	5480	2710	163	282	2313
164	164	603	183	181	166	5976	10134	6012	5481	2711	164	283	2314
165	165	604	184	182	167	5977	10135	6013	5482	2712	165	284	2315
166	166	605	185	183	168	5978	10136	6014	5483	2713	166	285	2316
167	167	606	186	184	169	5979	10137	6015	5484	2714	167	286	2317
168	168	607	187	185	170	5980	10138	6016	5485	2715	168	287	2318
169	169	608	188	186	171	5981	10139	6017	5486	2716	169	288	2319
170	170	609	189	187	172	5982	10140	6018	5487	2717	170	289	2320

X N.I.L.	14 Ky.	15 La.	16 Md.	17 Mass	18 Mich.	19 Minn.	20 Mo.	21 Mont	22 Neb.	23 Nev.	24 N.H.	25 N.Y.	26 N.C.
171	171	610	190	188	173	5983	10141	6019	5488	2718	171	300	2321
172	172	611	191	189	174	5984	10142	6020	5489	2719	172	301	2322
173	173	612	192	190	175	5985	10143	6021	5490	2720	173	302	2323
174	174	613	193	191	176	5986	10144	6022	5491	2721	174	303	2324
175	175	614	194	192	177	5987	10145	6023	5492	2722	175	304	2325
176	176	615	195	193	178	5988	10146	6024	5493	2723	176	305	2326
177	177	616	196	194	179	5989	10147	6025	5494	2724	177	306	2327
178	178	617	197	195	180	5990	10148	6026	5495	2725	178	310	2328
179	179	618	198	196	181	5991	10149	6027	5496	2726	179	311	2329
180	180	619	199	197	182	5992	10150	6028	5497	2727	180	312	2330
181	181	620	200	198	183	5993	10151	6029	5498	2728	181	313	2331
182	182	621	201	199	184	5994	10152	6030	5499	2729	182	314	2332
183	183	622	202	200	185	5995	10153	6031	5500	2730	183	315	2333
184	184	623	203	201	186	5996	10154	6032	5501	2731	184	320	2334
185	185	624	204	202	187	5997	10155	6033	5502	2732	185	321	2335
186	186	625	205	203	188	5998	10156	6034	5503	2733	186	322	2336
187	187	626	206	204	189	5999	10157	6035	5504	2734	187	323	2337
188	188	627	207	205	190	6000	10158	6036	5505	2735	188	324	2338
189	189	628	208	206	191	6001	10159	6037	5506	2736	189	325	2339
190	....	629	13	....	1	6002	9971	5482	....	2737	....	1	....
191	190	630	14	207	2	6003	10160	5843	5507	2738	190	2	2340
192	191	631	15	208	2	6004	10161	5844	5508	2739	191	3	2342
193	192	632	16	209	2	6005	10162	5845	5509	2740	192	4	2343
194	193	633	17	210	2	6006	10163	5846	5510	2741	193	5	....
195	194	634	18	211	2	6007	10164	5847	....	2742	194	6	2345
196	195	635	19	212	2	6008	10165	5848	5511	2743	195	7	2344
197	....	....	19	....	192	6009	.....	....	....	....	196	....	....
198	....	....	....	....	....	.....	.....	....	....	....	196	....	....

(X) See *supra*, page xlix.

(14) Carroll's St. 1915, ch. 90b, sec. 3720b; Carroll's St. 1918, Supp., sec. 3720b.

(15) Marr's Ann. Rev. St. 1915, p. 148.

(16) Pub. Gen. Laws 1911, art. 13. See also, Bagby's Ann. Code 1911, p. 264.

(17) R. L. 1902, ch. 73.

(18) Comp. Laws 1915, ch. 119, p. 2280.

(19) Gen. St. 1913, p. 1291.

(20) Rev. St. 1909, ch. 86.

(21) Civ. Code 1907, p. 1595.

(22) Rev. St. 1913, ch. 54.

(23) Rev. Laws 1912, Vol. 1, p. 769.

(24) Laws of 1909, ch. 123.

(25) Consol. Laws, ch. XXXVIII.

(26) Pell's Rev. 1908, ch. 54.

X N.I.L.	27 N.D.	28 Ohio	29 Okla.	30 Ore.	31 R.I.	32 S.D.	33 Tenn.	34 Utah	35 Wash.	36 W.Va	37 Wis.	38 Wyo.
1	6886	8106	4051	5834	7	1	3516a9	1553	3392	4172	1675-1	3159
2	6887	8107	4052	5835	8	2	3516a10	1554	3393	4173	1675-2	3160
3	6888	8108	4053	5836	9	3	3516a11	1555	3394	4174	1675-3	3161
4	6889	8109	4054	5837	10	4	3516a12	1556	3395	4175	1675-4	3162
5	6890	8110	4055	5838	11	5	3516a13	1557	3396	4176	1675-5	3163
6	6891	8111	4056	5839	12	6	3516a14	1558	3397	4177	1675-6	3164
7	6892	8112	4057	5840	13	7	3516a15	1559	3398	4178	1675-7	3165
8	6893	8113	4058	5841	14	8	3516a16	1560	3399	4179	1675-8	3166
9	6894	8114	4059	5842	15	9	3516a17	1561	3400	4180	1675-9	3167
10	6895	8115	4060	5843	16	10	3516a18	1562	3401	4181	1675-10	3168
11	6896	8116	4061	5844	17	11	3516a19	1563	3402	4182	1675-11	3169
12	6897	8117	4062	5845	18	12	3516a20	1564	3403	4183	1675-12	3170
13	6898	8118	4063	5846	19	13	3516a21	1565	3404	4184	1675-13	3171
14	6899	8119	4064	5847	20	14	3516a22	1566	3405	4185	1675-14	3172
15	6900	8120	4065	5848	21	15	3516a23	1567	3406	4186	1675-15	3173
16	6901	8121	4066	5849	22	16	3516a24	1568	3407	4187	1675-16	3174
17	6902	8122	4067	5850	23	17	3516a25	1569	3408	4188	1675-17	3175
18	6903	8123	4068	5851	24	18	3516a26	1570	3409	4189	1675-18	3176
19	6904	8124	4069	5852	25	19	3516a27	1571	3410	4190	1675-19	3177
20	6905	8125	4070	5853	26	20	3516a28	1572	3411	4191	1675-20	3178
21	6906	8126	4071	5854	27	21	3516a29	1573	3412	4192	1675-21	3179
22	6907	8127	4072	5855	28	22	3516a30	1574	3413	4193	1675-22	3180
23	6908	8128	4073	5856	29	23	3516a31	1575	3414	4194	1675-23	3181
24	6909	8129	4074	5857	30	24	3516a32	1576	3415	4195	1675-50	3182
25	6910	8130	4075	5858	31	25	3516a33	1577	3416	4196	1675-51	3183
26	6911	8131	4076	5859	32	26	3516a34	1578	3417	4197	1675-52	3184
27	6912	8132	4077	5860	33	27	3516a35	1579	3418	4198	1675-53	3185
28	6913	8133	4078	5861	34	28	3516a36	1580	3419	4199	1675-54	3186
29	6914	8134	4079	5862	35	29	3516a37	1581	3420	4200	1675-55	3187
30	6915	8135	4080	5863	36	30	3516a38	1582	3421	4201	1676	3188
31	6916	8136	4081	5864	37	31	3516a39	1583	3422	4202	1676-1	3189
32	6917	8137	4082	5865	38	32	3516a40	1584	3423	4203	1676-2	3190
33	6918	8138	4083	5866	39	33	3516a41	1585	3424	4204	1676-3	3191
34	6919	8139	4084	5867	40	34	3516a42	1586	3425	4205	1676-4	3192
35	6920	8140	4085	5868	41	35	3516a43	1587	3426	4206	1676-5	3193
36	6921	8141	4086	5869	42	36	3516a44	1588	3427	4207	1676-6	3194
37	6922	8142	4087	5870	43	37	3516a45	1589	3428	4208	1676-7	3195
38	6923	8143	4088	5871	44	38	3516a46	1590	3429	4209	1676-8	3196
39	6924	8144	4089	5872	45	39	3516a47	1591	3430	4210	1676-9	3197
40	6925	8145	4090	5873	46	40	3516a48	1592	3431	4211	1676-10	3198
41	6926	8146	4091	5874	47	41	3516a49	1593	3432	4212	1676-11	3199
42	6927	8147	4092	5875	48	42	3516a50	1594	3433	4213	1676-12	3200
43	6928	8148	4093	5876	49	43	3516a51	1595	3434	4214	1676-13	3201
44	6929	8149	4094	5877	50	44	3516a52	1596	3435	4215	1676-14	3202
45	6930	8150	4095	5878	51	45	3516a53	1597	3436	4216	1676-15	3203

X N.I.L.	27 N.D.	28 Ohio	29 Okla.	30 Ore.	31 R.I.	32 S.D.	33 Tenn.	34 Utah	35 Wash.	36 W.Va	37 Wis.	38 Wyo.
46	6931	8151	4096	5879	52	46	3516a54	1598	3437	4217	1676-16	3204
47	6932	8152	4097	5880	53	47	3516a55	1599	3438	4218	1676-17	3205
48	6933	8153	4098	5881	54	48	3516a56	1600	3439	4219	1676-18	3206
49	6934	8154	4099	5882	55	49	3516a57	1601	3440	4220	1676-19	3207
50	6935	8155	4100	5883	56	50	3516a58	1602	3441	4221	1676-20	3208
51	6936	8156	4101	5884	57	51	3516a59	1603	3442	4222	1676-21	3209
52	6937	8157	4102	5885	58	52	3516a60	1604	3443	4223	1676-22	3210
53	6938	8158	4103	5886	59	53	3516a61	1605	3444	4224	1676-23	3211
54	6939	8159	4104	5887	60	54	3516a62	1606	3445	4225	1676-24	3212
55	6940	8160	4105	5888	61	55	3516a63	1607	3446	4226	1676-25	3213
56	6941	8161	4106	5889	62	56	3516a64	1608	3447	4227	1676-26	3214
57	6942	8162	4107	5890	63	57	3516a65	1609	3448	4228	1676-27	3215
58	6943	8163	4108	5891	64	58	3516a66	1610	3449	4229	1676-28	3216
59	6944	8164	4109	5892	65	59	3516a67	1611	3450	4230	1676-29	3217
60	6945	8165	4110	5893	66	60	3516a68	1612	3451	4231	1677	3218
61	6946	8166	4111	5894	67	61	3515a69	1613	3452	4232	1677-1	3219
62	6947	8167	4112	5895	68	62	3516a70	1614	3453	4233	1677-2	3220
63	6948	8168	4113	5896	69	63	3516a71	1615	3454	4234	1677-3	3221
64	6949	8169	4114	5897	70	64	3516a72	1616	3455	4235	1677-4	3222
65	6950	8170	4115	5898	71	65	3516a73	1617	3456	4236	1677-5	3223
66	6951	8171	4116	5899	72	66	3516a74	1618	3457	4237	1677-6	3224
67	6952	8172	4117	5900	73	67	3516a75	1619	3458	4238	1677-7	3225
68	6953	8173	4118	5901	74	68	3516a76	1620	3459	4239	1677-8	3226
69	6954	8174	4119	5902	75	69	3516a77	1621	3460	4240	1677-9	3227
70	6955	8175	4120	5903	76	70	3516a78	1622	3461	4241	1678	3228
71	6956	8176	4121	5904	77	71	3516a79	1623	3462	4242	1678-1	3229
72	6957	8177	4122	5905	78	72	3516a80	1624	3463	4243	1678-2	3230
73	6958	8178	4123	5906	79	73	3516a81	1625	3464	4244	1678-3	3231
74	6959	8179	4124	5907	80	74	3516a82	1626	3465	4245	1678-4	3232
75	6960	8180	4125	5908	81	75	3516a83	1627	3466	4246	1678-5	3233
76	6961	8181	4126	5909	82	76	3516a84	1628	3467	4247	1678-6	3234
77	6962	8182	4127	5910	83	77	3516a85	1629	3468	4248	1678-7	3235
78	6963	8183	4128	5911	84	78	3516a86	1630	3469	4249	1678-8	3236
79	6964	8184	4129	5912	85	79	3516a87	1631	3470	4250	1678-9	3237
80	6965	8185	4130	5913	86	80	3516a88	1632	3471	4251	1678-10	3238
81	6966	8186	4131	5914	87	81	3516a89	1633	3472	4252	1678-11	3239
82	6967	8187	4132	5915	88	82	3516a90	1634	3473	4253	1678-12	3240
83	6968	8188	4133	5916	89	83	3516a91	1635	3474	4254	1678-13	3241
84	6969	8189	4134	5917	90	84	3516a92	1636	3475	4255	1678-14	3242
85	6970	8190	4135	5918	91	85	3516a93	1637	3475½	4256	1678-15	3243

X N.I.L.	27 N.D.	28 Ohio	29 Okla.	30 Ore.	31 R.I.	32 S.D.	33 Tenn.	34 Utah	35 Wash.	36 W.Va	37 Wis.	38 Wyo.
86	6971	8191	4136	5919	92	86	3516a94	1638	3476	4257	1678-16	3244
87	6972	8192	4137	5920	93	....	3516a95	1639	3477	4258	1678-17	3245
88	6973	8193	4138	5921	94	87	3516a96	1640	3478	4259	1678-18	3246
89	6974	8194	4139	5922	95	88	3516a97	1641	3479	4260	1678-19	3247
90	6975	8195	4140	5923	96	89	3516a98	1642	3480	4261	1678-20	3248
91	6976	8196	4141	5924	97	90	3516a99	1643	3481	4262	1678-21	3249
92	6977	8197	4142	5925	98	91	3516a100	1644	3482	4263	1678-22	3250
93	6978	8198	4143	5926	99	92	3516a101	1645	3483	4264	1678-23	3251
94	6979	8199	4144	5927	100	93	3516a102	1646	3484	4265	1678-24	3252
95	6980	8200	4145	5928	101	94	3516a103	1647	3485	4266	1678-25	3253
96	6981	8201	4146	5929	102	95	3516a104	1648	3486	4267	1678-26	3254
97	6982	8202	4147	5930	103	96	3516a105	1649	3487	4268	1678-27	3255
98	6983	8303	4148	5931	104	97	3516a106	1650	3488	4269	1678-28	3256
99	6984	8204	4149	5932	105	98	3516a107	1651	3489	4270	1678-29	3257
100	6985	8205	4150	5933	106	99	3516a108	1652	3490	4271	1678-30	3258
101	6986	8206	4151	5934	107	100	3516a109	1653	3491	4272	1678-31	3259
102	6987	8207	4152	5935	108	101	3516a110	1654	3492	4273	1678-32	3260
103	6988	8208	4153	5936	109	102	3516a111	1655	3493	4274	1678-33	3261
104	6989	8209	4154	5937	110	103	3516a112	1656	3494	4275	1678-34	3262
105	6990	8210	4155	5938	111	104	3516a113	1657	3495	4276	1678-35	3263
106	6991	8211	4156	5939	112	105	3516a114	1658	3496	4277	1678-36	3264
107	6992	8212	4157	5940	113	106	3516a115	1659	3497	4278	1678-37	3265
108	6993	8213	4158	5941	114	107	3516a116	1660	3498	4279	1678-38	3266
109	6994	8214	4159	5942	115	108	3516a117	1661	3499	4280	1678-39	3267
110	6995	8215	4160	5943	116	109	3516a118	1662	3500	4281	1678-40	3268
111	6996	8216	4161	5944	117	110	3516a119	1663	3501	4282	1678-41	3269
112	6997	8217	4162	5945	118	111	3516a120	1664	3502	4283	1678-42	3270
113	6998	8218	4163	5946	119	112	3516a121	1665	3503	4284	1678-43	3271
114	6999	8219	4164	5947	120	113	3516a122	1665x	3504	4285	1678-44	3272
115	7000	8220	4165	5948	121	114	3516a123	1665x1	3505	4286	1678-45	3273
116	7001	8221	4166	5949	122	115	3516a124	1665x2	3506	4287	1678-46	3274
117	7002	8222	4167	5950	123	116	3516a125	1665x3	3507	4288	1678-47	3275
118	7003	8223	4168	5951	124	117	3516a126	1665x4	3508	4289	1678-48	3276
119	7004	8224	4169	5952	125	118	3516a127	1665x5	3509	4290	1679	3277
120	7005	8225	4170	5953	126	119	3516a128	1665x6	3510	4291	1679-1	3278
121	7006	8226	4171	5954	127	120	3516a129	1665x7	3511	4292	1679-2	3279
122	7007	8227	4172	5955	128	121	3516a130	1665x8	3512	4293	1679-3	3280
123	7008	8228	4173	5956	129	122	3516a131	1665x9	3513	4294	1679-4	3281
124	7009	8229	4174	5957	130	123	3516a132	1665x10	3514	4295	1679-5	3282
125	7010	8230	4175	5958	131	124	3516a133	1665x11	3515	4296	1679-6	3283

X N.I.L.	27 N.D.	28 Ohio	29 Okla.	30 Ore.	31 R.I.	32 S.D.	33 Tenn.	34 Utah	35 Wash.	36 W.Va	37 Wis.	38 Wyo.
126	7011	8231	4176	5959	132	125	3516a134	1665x12	3516	4297	1680	3284
127	7012	8232	4177	5960	133	126	3516a135	1665x13	3517	4298	1680a	3285
128	7013	8233	4178	5961	134	127	3516a136	1665x14	3518	4299	1680b	3286
129	7014	8234	4179	5962	135	128	3516a137	1665x15	3519	4300	1680c	3287
130	7015	8235	4180	5963	136	129	3516a138	1665x16	3520	4301	1680d	3288
131	7016	8236	4181	5964	137	130	3516a139	1665x17	3521	4302	1680e	3289
132	7017	8237	4182	5965	138	131	3516a140	1665x18	3522	4303	1680f	3290
133	7018	8238	4183	5966	139	132	3516a141	1665x19	3523	4304	1680g	3291
134	7019	8239	4184	5967	140	133	3516a142	1665x20	3524	4305	1680h	3292
135	7020	8240	4185	5968	141	134	3516a143	1665x21	3525	4306	1680i	3293
136	7021	8241	4186	5969	142	135	3516a144	1665x22	3526	4307	1680j	3294
137	7022	8242	4187	5970	143	....	3516a145	1665x23	3527	4308	1680k	3295
138	7023	8243	4188	5971	144	136	3516a146	1665x24	3528	4309	1680l	3296
139	7024	8244	4189	5972	145	137	3516a147	1665x25	3529	4310	1680m	3297
140	7025	8245	4190	5973	146	138	3516a148	1665x26	3530	4311	1680n	3298
141	7026	8246	4191	5974	147	139	3516a149	1665x27	3531	4312	1680o	3299
142	7027	8247	4192	5975	148	140	3516a150	1665x28	3532	4313	1680p	3300
143	7028	8248	4193	5976	149	141	3516a151	1665x29	3533	4314	1681	3301
144	7029	8249	4194	5977	150	142	3516a152	1665x30	3534	4315	1681-1	3302
145	7030	8250	4195	5978	151	143	3516a153	1665x31	3535	4316	1681-2	3303
146	7031	8251	4196	5979	152	144	3516a154	1665x32	3536	4317	1681-3	3304
147	7032	8252	4197	5980	153	145	3516a155	1665x33	3537	4318	1681-4	3305
148	7033	8253	4198	5981	154	146	3516a156	1665x34	3538	4319	1681-5	3306
149	7033a	8254	4199	5982	155	147	3516a157	1665x35	3539	4320	1681-6	3307
150	7034	8255	4200	5983	156	148	3516a158	1665x36	3540	4321	1681-7	3308
151	7035	8256	4201	5984	157	149	3516a159	1665x37	3541	4322	1681-8	3309
152	7036	8257	4202	5985	158	150	3516a160	1665x38	3542	4323	1681-9	3310
153	7037	8258	4203	5986	159	151	3516a161	1665x39	3543	4324	1681-10	3311
154	7038	8259	4204	5987	160	152	3516a162	1665x40	3544	4325	1681-11	3312
155	7039	8260	4205	5988	161	153	3516a163	1665x41	3545	4326	1681-12	3313
156	7040	8261	4206	5989	162	154	3516a164	1665x42	3546	4327	1681-13	3314
157	7041	8262	4207	5990	163	155	3516a165	1665x43	3547	4328	1681-14	3315
158	7042	8263	4208	5991	164	156	3516a166	1665x44	3548	4329	1681-15	3316
159	7043	8264	4209	5992	165	157	3516a167	1665x45	3549	4330	1681-16	3317
160	7044	8265	4210	5993	166	158	3516a168	1665x46	3550	4331	1681-17	3318
161	7045	8266	4211	5994	167	159	3516a169	1665x47	3551	4332	1681-18	3319
162	7046	8267	4212	5995	168	160	3516a170	1665x48	3552	4333	1681-19	3320
163	7047	8268	4213	5996	169	161	3516a171	1665x49	3553	4334	1681-20	3321
164	7048	8269	4214	5997	170	162	3516a172	1665x50	3554	4335	1681-21	3322
165	7049	8270	4215	5998	171	163	3516a173	1665x51	3555	4336	1681-22	3323

X N.I.L.	27 N.D.	28 Ohio	29 Okla.	30 Ore.	31 R.I.	32 S.D.	33 Tenn.	34 Utah	35 Wash.	36 W.Va	37 Wis.	38 Wyo.
166	7050	8271	4216	5999	172	164	3516a174	1665x52	3556	4337	1681-23	3324
167	7051	8272	4217	6000	173	165	3516a175	1665x53	3557	4338	1681-24	3325
168	7052	8273	4218	6001	174	166	3516a176	1665x54	3558	4339	1681-25	3326
169	7053	8274	4219	6002	175	167	3516a177	1665x55	3559	4340	1681-26	3327
170	7054	8275	4220	6003	176	168	3516a178	1665x56	3560	4341	1681-27	3328
171	7055	8276	4221	6004	177	169	3516a179	1665x57	3561	4342	1681-28	3329
172	7056	8277	4222	6005	178	170	3516a180	1665x58	3562	4343	1681-29	3330
173	7057	8278	4223	6006	179	171	3516a181	1665x59	3563	4344	1681-30	3331
174	7058	8279	4224	6007	180	172	3516a182	1665x60	3564	4345	1681-31	3332
175	7059	8280	4225	6008	181	173	3516a183	1665x61	3565	4346	1681-32	3333
176	7060	8281	4226	6009	182	174	3516a184	1665x62	3566	4347	1681-33	3334
177	7061	8282	4227	6010	183	175	3516a185	1665x63	3567	4348	1681-34	3335
178	7062	8283	4228	6011	184	176	3516a186	1665x64	3568	4349	1681-35	3336
179	7063	8284	4229	6012	185	177	3516a187	1665x65	3569	4350	1681-36	3337
180	7064	8285	4230	6013	186	178	3516a188	1665x66	3570	4351	1681-37	3338
181	7065	8286	4231	6014	187	179	3516a189	1665x67	3571	4352	1681-38	3339
182	7066	8287	4232	6015	188	180	3516a190	1665x68	3572	4353	1681-39	3340
183	7067	8288	4233	6016	189	181	3616a191	1665x69	3573	4354	1681-40	3341
184	7068	8289	4234	6017	190	182	3516a192	1665x70	3574	4355	1684	3342
185	7069	8290	4235	6018	191	183	3516a193	1665x71	3575	4356	1684-1	3343
186	7070	8291	4236	6019	192	184	3516a194	1665x72	3576	4357	1684-2	3344
187	7071	8292	4237	6020	193	185	3516a195	1665x73	3577	4358	1684-3	3345
188	7072	8293	4238	6021	194	186	3516a196	1665x74	3578	4359	1684-4	3346
189	7073	8294	4239	6022	195	187	3516a197	1665x75	3579	4360	1684-5	3347
190	7074	....	4044	6023	....	188	3516a2	1665x76	3580	4361	.....	3348
191	7075	8295	4045	6023	1	189	3516a3	1665x77	3581	4362	1675	3349
192	7076	8296	4046	6023	2	190	3516a4	1665x78	3582	4363	1675	3350
193	7077	8297	4047	6023	3	191	3516a5	1665x79	3583	4364	1675	3351
194	7078	8298	4048	6023	4	192	3516a6	1665x80	3584	4365	1675	3352
195	7079	8299	4049	6024	5	193	3516a7	1665x81	3585	4366	1675	3353
196	7080	8300	4050	6025	6	194	3516a8	1665x82	3586	4367	1675	3354
197	....	....	....	....	....	195	.....	.....	.....	4368	1684-7	....
198	....	....	....	....	....	....	.....	.....	.....	....	.....	....

(X) See *supra*, page xlix.
(27) Comp. Laws 1913, ch. 103, p. 1622.
(28) Ann. Gen. Code 1912, Vol. 3, p. 967, tit. VII, div. II, ch. I.
(29) Rev. Laws Ann. 1910, Vol. 1, ch. 49.
(30) Lord's Gen. Law, 1910, Vol. 3, tit. XL, ch. II.
(31) Gen. Laws 1909, tit. XIX.
(32) Comp. Laws 1913, Vol. 2, p. 298.
(33) Ann. Code 1917, p. 2908.
(34) Comp. St. 1907, tit. 53.
(35) Rem. Codes and St. 1915, Vol. 1, p. 1124.
(36) Code 1913, Vol. 2, ch. 98a.
(37) St. 1915, ch. 78.
(38) Comp. St. Ann. 1910, ch. 210.

ARRANGEMENT

The arrangement of the Negotiable Instruments Law herein, with the annotation thereof, is as follows:

FIRST. The text of each section of the Negotiable Instruments Law, as recommended by the Commissioners on Uniform Legislation. (See Preface to first edition.)

SECOND. The changes, if any, made in the section in the various States adopting the Law.

THIRD. A brief summary of the criticisms and comments, if any, upon the section by Professor Ames, Judge Brewster and Mr. McKeehan. (See articles in full, *infra*, pp. 418-549.)

FOURTH. The American cases decided under the section with comments.

(The cases cited generally without abstracts are either cases in which the court made no reference to the Negotiable Instruments Law (although the Law was in force at the time), or cases abstracted under other sections to which reference is made, or cases which involve no question of sufficient novelty or importance or in which the application of the Law is too plain to justify an abstract. Such cases are placed at the head of the cases under the respective sections, and are cited for the sake of completeness. A few of the cases in which the Law was not cited have, however, been abstracted because of their special interest or novelty, the fact that the Law was not mentioned being noted in the abstract. Cases which have been decided since the Law went into effect, but to which it was not applicable because the instruments were issued before the Law was adopted, are not cited. The abbreviation "S. C. sec.," at the end of the citation of some of the cases, means that an abstract of the same case upon another point will be found under the section indicated by the numeral following the abbreviation.)

FIFTH. The English cases decided under the corresponding section of the Bills of Exchange Act. (It would require too much space to include in the abstracts of these cases the text of the sections of the Bills of Exchange Act therein involved. Reference should therefore be made to the corresponding sections of the Negotiable Instruments Law, as shown in Appendix II, Table II.)

SIXTH. Annotations in foot notes, showing the differences in substance and sometimes in form between the Bills of Exchange Act and the Negotiable Instruments Law.

ABBREVIATIONS. B. E. A.: Bills of Exchange Act of England. N. I. L.: Negotiable Instruments Law.

The Negotiable Instruments Law[1]

A GENERAL ACT RELATING TO NEGOTIABLE INSTRUMENTS (BEING AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES ON THAT SUBJECT).[2]

TITLE I.

NEGOTIABLE INSTRUMENTS IN GENERAL.

ARTICLE I.

FORM AND INTERPRETATION.

Sec. 1. Form of Negotiable Instrument.

Be it enacted, etc., An instrument[3] to be negotiable must conform to the following requirements:—

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[1] This Act does not affect the right of parties to non-negotiable instruments. Westberg v. Chicago Lumber Co., 117 Wis. 589, 94 N. W. 572; Windsor Cement Co. v. Thompson, 86 Conn. 511, 86 Atl. 1; Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23; Newland v. Moore (N. C.), 92 S. E. 367; Reynolds v. Vint, 73 Or. 528, 144 Pac. 526, S. C. sec. 4-2.

[2] For cases rightly favoring a liberal construction of the law in the interest of uniformity, see *Ex parte* Goldberg & Lewis, 191 Ala. 356, 67 So. 839, L. R. A. 1915F, 1157; Windsor Cement Co. v. Thompson, 86 Conn. 511, 86 Atl. 1; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886; State Bank of Halstad v. Bilstad, 162 Iowa 433, 136 N. W. 204, 144 N. W. 363; Lighter v. Roach, 126 Md. 474, 95 Atl. 62; Thorpe v. White, 188 Mass. 333, 74 N. E. 592; Toole v. Crafts, 193 Mass. 110, 78 N. E. 775; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Hartington Nat. Bank v. Breslin, 88 Neb. 47, 128 N. W. 659, 31 L. R. A. (N.S.) 130; Brewster v. Schrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606; Century Bank v. Breithart, 89 Misc. Rep. 308, 151 N. Y. Supp. 588; Brown v. Brown, 91 Misc. Rep. 220, 154 N. Y. Supp. 1098; McCarthy v. Kepreta, 24 N. D. 395, 139 N. W. 992, 48 L. R. A. (N. S.) 65n, Ann. Cas. 1915A, 834; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; Cherokee Nat. Bank v. Union Trust Co., 33 Okl. 342, 125 Pac. 464; B. & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837; Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14; Columbia Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451; American Trust Co. v. Canevin, 184 Fed. Rep. 657, 107 C. C. A. 543.

Contra, and construing the law strictly in favor of the pre-existing law of the State, are Guenther v. Bank of Monroe, 90 Neb. 280, 133 N. W. 402; Elgin v. Gross-Kelly Co., 20 N. M. 450, 150 Pac. 922, L. R. A. 1916A, 711; Sutherland v. Mead, 80 App. Div. 103, 80 N. Y. Supp. 504; Roseman v. Mahoney, 86 App. Div. 377, 83 N. Y. Supp. 749; Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925; Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136; First Nat. Bank v. Boule Nat. Bank (S. D.), 161 N. W. 616.

[3] The Illinois act interpolates "payable in money" after "instrument" because in that State instruments payable in goods had previously been negotiable.

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money; (*a*)
3. Must be payable on demand, or at a fixed or determinable future time; (*b*)
4. Must be payable to order or to bearer;[4] (*c*) and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. (*d*)

The Michigan Act uses, "Certain sum" instead of "sum certain."

The Arizona, Idaho, Iowa, Kentucky, North Carolina and Wyoming Acts read, in subsection 4: "Must be payable to the order of a specified person, or to bearer," but "specified person" is surplusage. See Section 8.

The Wisconsin Act adds: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by any officer thereof or any other person, and no obligation nor instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185, S. C. sec. 5-1; Borough of Montvale v. People's Bank, 74 N. J. Law, 464, 67 Atl. 67, S. C. sec. 56; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607.

(a) First Nat. Bank v. Garland, 160 Ill. App. 407; Bailey v. Inland Empire Co., 75 Ore. 309, 146 Pac. 991, S. C. sec. 27.

A note otherwise negotiable in form but containing a clause: "This note is payable when Post Office Department accepts my

[4] "A negotiable bill may be payable either to order or to bearer." B. E. A. s. 8 (2).

building from me," is non-negotiable. The N. I. L. was not cited. Devine v. Price, 152 N. Y. Supp. 321.

An order to pay A, or order, "$300.00, or what may be due on my deposit book," is conditional. National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428.

An instrument drawn by a special agent of a foreign insurance company directing the drawee (the company) "on acceptance" to pay to the order of the payee a sum of money in satisfaction of all claims under a certain policy is not payable unconditionally, and is not negotiable, and neither the drawee nor the drawer can be held thereon. Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172, 87 N. E. 687.

A note reciting that it is for the purchase price of timber conveyed by deed of maker, is secured by retention of title to said timber and is subject to provisions of said deed, is not unconditional and is not negotiable. Pope v. Righter, etc., Lumber Co., 162 N. C. 206, 78 S. E. 65.

A stipulation on the back of a note that it was secured by a mortgage, and that the payee agreed to look to mortgage security for its payment, became a part of the note, and rendered it non-negotiable. Allison v. Hollenbeak, 138 Iowa, 479, 114 N. W. 1059.

A note contained a stipulation that it was executed as part of the purchase price of certain real property and was secured "by a mortgage—and subject to all the terms and conditions of such mortgage." The mortgage contained a provision whereby the payee of the note agreed to repurchase or procure a purchaser for the property at the end of a year, the note to go in part payment of the price, or if the payee failed to do so, then the note to be cancelled as liquidated damages. *Held*, that the note was not negotiable. Hull v. Angus, 60 Ore. 95, 118 Pac. 284.

A note agreeing to pay any taxes assessed upon the note or its mortgage security is not negotiable, although no tax was actually imposed upon the note or mortgage. Coolidge v. Saltmarsh (Wash.), 165 Pac. 508.

A provision in a note that if the maker shall allow the taxes or other public rates and assessments on the property, mortgaged to secure the note, to become delinquent, or in case any taxes or assessments shall be levied against the holder on account of the note, the whole amount of the note shall become due and payable and the mortgagee may at once proceed to collect the note and foreclose the mortgage, etc., renders the note non-negotiable, because there is an implication that the maker is charged with the payment of the taxes, etc., the amount of which is uncertain. Bright v. Offield, 81 Wash. 442, 143 Pac. 159, S. C. secs. 4-2, 5.

Municipal warrants are not negotiable, although they may be transferred by delivery or assignment. But the vendor of such warrants purporting to be drawn upon a special fund im-

pliedly warrants that they are valid existing obligations The N. I. L. was not cited. Logan County Bank v. Farmers Nat. Bank, 55 Okl. 592, 155 Pac. 561.

Street improvement bonds, payable to bearer, issued under a statute which provided that such bonds shall be negotiable as inland bills of exchange and free from all defenses by any property owner, are negotiable instruments. Citizens Trust, etc., Co. v. Hays, 167 Ky. 560, 180 S. W. 811.

A promissory note in due form is negotiable, although it is secured by a mortgage which provides that on default in interest or failure to comply with any of the conditions of the mortgage, the whole shall, at the option of the mortgagee, become due and payable. The court also cited sections 2-3 and 4-4, the latter, a new section composed of the words, "at a fixed period after date or sight, though payable before then on a contingency," and of the last paragraph of section 4-3 N. I. L. Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. secs. 31, 38.

Provisions in a mortgage securing a negotiable promissory note requiring the maker to pay in addition to the principal debt and interest, such sums as the mortgagee may be required to incur for insurance, taxes, assessments and charges on the land, are not imported into the note so as to affect its negotiability; citing Thorp v. Mindeman, *supra;* Barker v. Sartori, 66 Wash. 260, 119 Pac. 611; S. C. sec. 56.

The provision of a mortgage requiring the mortgagor to pay taxes thereon in a certain contingency will not affect the negotiability of the note thereby secured, as this simply creates the mortgage a lien therefor, and does not entitle the mortgagee to collect taxes as a part of the debt. But such a provision in the note itself will render it non-negotiable because of uncertainty in amount. Des Moines Sav. Bank v. Arthur, 163 Iowa, 205, 143 N. W. 556, Ann. Cas 1916C, 498, S. C. sec. 4-2.

A provision in a mortgage of realty that if the mortgagor allowed the taxes to becomes delinquent, or the property to be sold for taxes, or failed to pay the interest on the note as due, the note should become due and payable in sixty days thereafter and foreclosure might proceed, even if contained in the note, was merely a condition defining the default and authorizing foreclosure, and does not affect the negotiability of the note. Lundean v. Hamilton (Iowa), 159 N. W. 163.

A provision that if a mortgagor neglected to pay taxes and assessments or to pay the insurance, the mortgagee might do so and recover of the mortgagor the amount so paid, with interest at eight per cent., for which the mortgage should stand as security, did not destroy the negotiability of the note, as it might be sued on independently. *Ib.*

A provision in a mortgage that costs should include the costs of an abstract of title, and that the mortgagor should keep the buildings insured for the benefit of the mortgagee, even if

leaving the cost of insurance and of the abstract uncertain, dealt wholly with the betterment of the security, and did not affect the note. *Ib.*

Provisions in the mortgage securing a note, respecting insurance payment of taxes and attorney's fees on foreclosure do not destroy the negotiability of the note even if they would do so if incorporated in the note, since they relate merely to the preservation of the security, citing Bright v. Offield, *supra;* Moore & Co v. Burling, 93 Wash. 217, 160 Pac. 420, S. C. sec. 56.

A provision in a mortgage securing a promissory note that the mortgagor should pay all taxes hereafter assessed against the note does not render the note non-negotiable. Page v. Ford, 65 Ore. 450, 131 Pac. 1013, Ann. Cas. 1915A, 1048, 45 L. R. A. (N. S.) 247, S. C. secs. 8-5, 38.

Bonds otherwise negotiable in form issued by a joint-stock association are none the less negotiable because of a provision therein making them payable solely out of assets assigned to a trustee under a trust deed or out of other assets of the association, and exonerating the shareholders of the association from the individual liability to which they would otherwise be subject; and negotiability of the bonds renders the coupons negotiable.

Nor does the fact that the deed of trust securing the bonds reserves to a certain portion of the bondholders the right to waive default in payment of coupons and postpone the time of their payment, affect the negotiability of the coupons; the reservation relating to procedure under the trust deed, and not preventing enforcement of a bondholder's general remedies at law for the collection of the obligation. Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108. See 19 Harv. Law Rev. 616, for criticism of this case in the Appellate Division.

A note of a corporation recited that it was one of a series of notes issued under a trust agreement to which reference was made for a description of the terms and conditions on which the notes were secured, and contained a provision that in case of default in any of the conditions in the trust agreement the notes should become due and payable as therein provided. There was no evidence that the trust agreement contained any provision for postponing the maturity of the obligation. *Held,* that the notes contained an absolute obligation to pay the amount at maturity, and the conditions and their performance need not be alleged by the payee in suing on the notes. Hibbs v. Brown, *supra,* was cited but not the N. I. L. Osborne v. M. K. & T. Ry. Co., 92 Misc. Rep. 166, 155 N. Y. Supp. 236.

A draft in the ordinary form contained the following words after the sum: "400 c A. R. L. No. 3362 via A. R. L. B. L. direct." These words, under the custom and usage of business, notify the payee that a certain number of cases had been shipped by a certain line, and that the bill of lading went direct to the payee. *Held,* that the draft was an unconditional order and

negotiable. Waddell v. Hanover Nat. Bank, 48 Misc. R. 578, 97 N. Y. S. 305.

A note promising to pay at a certain time, but providing for an extension until a certain suit is determined, but not to exceed one year, is an absolute promise to pay not dependent on the outcome of the suit. The N. I. L. was not cited. Jewett Lumber Co. v. Martin Conroy Co., 171 Iowa 513, 152 N. W. 493.

A note payable in six installments, maturing at different times within thirteen months, is not rendered non-negotiable by a provision that "a discount of six per cent. will be allowed if paid in full within fifteen days from date." Farmers Loan & Trust Co. v. Planck, 98 Neb. 225, 152 N. W. 390, L. R. A. 1915E, 564; Farmers Loan & Trust Co. v. Devear, 2 Tenn. C. C. A. 366, *contra.*

In Oklahoma, under the law merchant, a note payable in installments three months apart, which contained a stipulation that if paid within fifteen days from date, a discount of six per cent. would be allowed, was held indefinite and uncertain at the time of its execution, as to the amount payable and was therefore not negotiable and it has been held in that state that this rule has not been changed by the Negotiable Instruments Law which does not purport to prescribe a different rule. First Nat. Bank v. Watson (Okl.), 155 Pac. 1152.

(b) Union Stockyards Nat. Bank v. Bolan, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146, S. C. sec. 184; Fisher v. O'Hanlon, 93 Neb. 529, 141 N. W. 157; Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, S. C. sec. 1-2.

An instrument in the following form:

"$250. Aug. 14, 1907. Mr. W. T. will please pay to R. J. T., or order, two hundred and fifty dollars and charge to my account. Due Oct. 1st, J. R." is payable Oct 1st, and is a bill of exchange. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223.

A note expressed to be "payed when we get it from the brewery after date," is not negotiable. Wray v. Miller, 120 N. Y. Supp. 787.

Where a contract of sale contained a provision as to the payment of notes given for the purchase price, the contract and the notes must be construed together to determine the negotiability of the notes. So where the contract provided that the notes should be paid in monthly installments in sums of fifty per cent. or more of the monthly earnings of the plant, the notes were non-negotiable under sections 1-3. Bank of Evansville v. Kurth, 167 Wis. 43, 166 N. W. 658.

Sed quaere since there was "nothing in the notes to show that the principal could or was to be paid in installments."

The fact that notes are made in a series, payable at different times and all to become due upon default in one does not make the notes non-negotiable. Such notes become due upon default only at the option of the holder and the holder of earlier notes upon which default has been made can declare due only the notes which he holds. White v. Hatcher, 135 Tenn. 609, 188 S. W. 61.

(c) Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N.S.), 804 S. C. sec. 9-5; Kerr v. Smith, 156 App. Div. 807, 142 N. Y. Supp. 57; De Groat v. Frecht, 37 Okla. 267, 131 Pac. 172; Quest v. Ruggles, 72 Wash. 609, 131 Pac. 202, S. C. sec. 10.

"Four months after date I promise to pay ten hundred forty-four 71/100 dollars." Held, not a promissory note and defendant who signed his name on the back and transferred it is not liable as an indorser. Hillborn v. Penn. Cement Co., 145 A. D. 442, 129 N. Y. Supp. 957.

A promissory note not payable to order or to bearer is not negotiable. A former statute, otherwise providing, is impliedly repealed by the N. I. L. Gilley v. Harrell, 118 Tenn. 115, 101 S. W. 424, S. C. sec. 123; Dobbins v. Carroll, 137 Tenn. 133, 192 S. W. 166. It seems too narrow to say that the exact words "order" or "bearer" must be used. Any equivalent word should suffice. See section 10 and cases. See also, as to first point, Fulton v. Varney, 117 App. Div. 572, 575, 102 N. Y. Supp. 608; Westberg v. Chicago Lumber Co., 117 Wis. 589, 94 N. W. 572, S. C. sec. 137; Hilborn v. Penn. Cement Co., 145 App. Div. 442, 129 N. Y. Supp. 957; Kinsella v. Lockwood, 79 Misc. Rep. 619, 140 N. Y. Supp. 513; Ahrens & Ott Mfg. Co. v. Geo. Moore & Sons, 131 Tenn. 191, 174 S. W. 270; Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23, S. C. p. 1, n. 1, sec. 9-5.

To make a bill or note negotiable, the words "to order" or "to bearer," or equivalent words must be used in the body of the note. Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N. S.) 804, S. C. sec. 9-5; Aamoth v. Hunter, 33 N. D. 582, 157 N. W. 299.

A certificate of deposit payable to "A or his assigns on return of this certificate" is not negotiable under the N. I. L. nor under the law merchant. Zander v. N. Y. Security & Trust Co., 39 Misc. R. 98, 78 N. Y. Supp. 900, affirmed, 81 App. Div. 635, 81 N. Y. Supp. 1151, affirmed, 178 N. Y. 208, because of the words "which is assignable only on the books of the company" which followed the words "on return of this certificate," the court conceding that without these additional words the certificate might have been negotiable and citing cases to that effect. But a certificate of deposit payable to the order of the payee is negotiable. Dickey v. Adler, 143 Mo. App. 326 127 S. W. 593; Kushner v. Abbott, 156 Iowa 598, 137 N. W. 913. So also when payable upon its return or surrender properly indorsed. Johnson v. Blackman (Ala.), 78 So. 891.

A note was drawn payable "to the order of B & F." The maker refused to sign it unless the words "to the order" were stricken out which was done by drawing a line through those words. Thereafter B erased the line, struck out the words "& F," inserted the initials "H A" before "B," and indorsed the note to plaintiff, a holder in due course, who sued the maker. *Held,* that the note as signed was not negotiable and that it was error to exclude evidence of failure of consideration and material alteration. Aamoth v. Hunter, 33 N. D. 582, 157 N. W. 299.

The complaint alleged that defendant "for value received, duly made, executed and delivered to plaintiff her promissory note in writing for $2,500." *Held,* that this was an action on a non-negotiable note, since it was not alleged to be payable to order or to bearer, and that consideration must therefore be alleged and proved. Also that the words "value received," is not a sufficient allegation of consideration. Martial Armand & Co. v. Creighton, 167 N. Y. Supp. 333.

Where a complaint on a promissory note did not allege that the note contained words of negotiability, as defined in sections 1, 7 and 8, that is, payable to "order" or "bearer," and the defendant pleaded fraud and failure and want of consideration, it was held, that the replication should show the negotiability of the note, and a replication alleging merely that plaintiff bought for value before maturity and without notice was demurrable. Whateley v. Muscogee Bank (Ala.), 72 So. 1018; Onconta Trust & Banking Co. v. Box (Ala.), 73 So. 759, citing sec. 184.

Where a complaint on a note does not declare on a negotiable note, the plea is not subject to demurrer for failure to aver that plaintiff had notice of the defense set up when he acquired the note. The N. I. L. was not cited. Jones v. Martin (Ala. App.), 74 So. 761, S. C. sec. 60.

Defendant made a note on a printed form containing the words "or order," and in the lower left-hand corner the words "not transferable" in a small, contracted hand. When plaintiff acquired the note he did not notice these words. The court found that the defendant was not negligent in not writing the words "not transferable" more plainly. *Held,* that the written portions of a note prevail over the printed, and that the note was not negotiable. Tanners' Nat. Bank v. Lacs, 136 App. Div. 92, 120 N. Y. Supp. 669. The N. I. L. was not cited in this case.

(*d*) Rinker v. Lauer, 13 Idaho 163, 88 Pac. 1057.

Sec. 2. Certainty as to Sum—What Constitutes.

The sum payable is a sum certain within the meaning of this act, although it is to be paid—

1. With interest; (*a*) or
2. By stated installments; or

3. By stated installments, with a provision that upon default in payment of any installment or of interest[1] the whole shall become due; (*b*) or
4. With exchange, whether at a fixed rate or at the current rate;[2](*c*) or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.[3](*d*)

The Idaho, Iowa, North Carolina and Wyoming Acts omit, "Or of interest" in subsection 3.

The Nebraska Act adds: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this State any sum for attorney's fees or other costs not allowable in other cases."

The North Carolina Act adds (section 197, Pells Revisal, section 2346): "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof."[4]

In South Dakota the following is substituted for subsection 5: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment or instrument made in this State any sum for attorney's fees, or other costs not now taxable by law."

(*a*) First Nat. Bank v. Berritt, 52 Mont. 359, 157 Pac. 951, S. C. sec. 3; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109.

A note dated May 1, 1905, and payable on or before Nov. 1, 1905, and which provides for "interest at 8 per cent. from Nov. 1, 1905, until paid. Interest from date if not paid when due,"

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[1] The words "or of interest" are omitted in the English Act. B. E. A. s. 9 (1) (c).

[2] "According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill." B. E. A. s. 9 (1) (d).

[3] Not in B. E. A.

[4] See Exchange Bank v. Appalachian Land, etc., Co., 128 N. C. 193, *infra*, pp. 12, 14.

is negotiable. Following Citizens' Savings Bank v. Landis, 37 Okl. 530, 132 Pac. 1101, and overruling Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946, and Bracken v. Fidelity Trust Co., 42 Okl. 118, 141 Pac. 6, L. R. A. 1915B, 1216; Security Trust, etc., Bank v. Gleichman, 50 Okl. 441, 150 Pac. 908.

But it was later held in Union Nat. Bank v. Mayfield (Okla.), 169 Pac. 626, that a promissory note containing the following provision, "With interest at the rate of nine per cent. per annum, payable annually from date until paid; provided, however, that if the note is paid on or before maturity, interest shall only be seven per cent., does not contain an unconditional promise to pay a sum certain in money within the provisions of section 1. The court overruled upon this point the preceding case of Security Trust & Savings Bank v. Gleichman, and followed the cases which had been overruled by that case. It is submitted that the case last overruled is correct and more in accordance with the weight of authority before the Negotiable Instruments Law, which does not seem to require a different ruling.

(*b*) Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554, Ann. Cas. 1912D, 163, S. C. sec. 66; Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. sec. 1-2.

A note provided that "the whole sum of principal and interest shall become immediately due and collectible at the option of the holder," if payment of interest and installments of the principal are not made when due. *Held,* that said stipulation will not be enforced as to interest not yet accrued on the principal, as being a penalty. Tyston v. Ellsworth, 18 Idaho 207, 109 Pac. 134.

(*c*) Bright v. Offield, 81 Wash. 442, 143 Pac. 159, S. C. secs. 1, 4-2, 5.

(*d*) *Ex parte* Bledsoe, 180 Ala. 586, 61 So. 813; Davis v. McColl, 176 Mo. App. 198, 166 S. W. 1113; Mechanics' American Nat. Bank v. Coleman, 204 Fed. Rep. 24, 122 C. C. A. 338; Smith v. Phifer, 104 S. C. 396, 89 S. E. 323, not citing the N. I. L.; Bright v. Offield, 81 Wash. 442, 143 Pac. 159, S. C. secs. 1, 4-2, 5.

A provision in a promissory note for attorney's fees "if collected by attorney, or if suit is brought on this note," is a promise to pay attorney's fees for collection only after dishonor, and does not impair the negotiability of the note. First Natl. Bank of Shawano v. Miller, 139 Wis. 126, 120 N. W. 820, S. C. sec. 104.

A stipulation in a note for a reasonable attorney's fee in case of suit, does not render the note non-negotiable. McCormick v. Severn, 36 Utah 6, 102 Pac. 626, 20 Ann. Cas. 1368; Potts v. Crudup (Okl.), 150 Pac. 170; Bank of Neeleyville v. Lee, 182 Mo. App. 185, 168 S. W. 796; Pitzer v. McCune, 152 Ill. App. 144, the N. I. L. not cited. Nor does a provision that "if suit is begun, judgment may be taken for an additional $15.00 and ten per cent. of the amount due for attorney's fees." Seton v. Exchange Bank (Okl.), 150 Pac. 1079.

Where a note provides for a ten per cent. attorney's fee, the holder is entitled to judgment for that amount without proving that it is reasonable, especially where there is no contention that it is unreasonable. First Nat. Bank v. Stam, 186 Mo. App. 439, 171 S. W. 567.

A clause in a note providing for ten per cent. collection charges and attorney's fee is valid and enforceable, and can not be said to be usurious, the amount expended being much more than the amount claimed and allowed therefor. Gate City Nat. Bank v. Strother (Mo. App.), 196 S. W. 447.

Semble, the attorney's fee is due if the unpaid note is placed in the hands of an attorney for collection, although no suit is brought. A stipulation in a mortgage securing the note for fees in case of suit on the mortgage is cumulative and not restrictive of the provision of the note. Morrison v. Ornbaun, 30 Mont. 111, 75 Pac. 953; Security State Bank v. Fussell, 36 Okl. 527, 129 Pac. 746 *contra* as to the first point.

If the note contains a clause for attorney's fees, if suit be brought, or if attorneys are employed to collect it, and the note is placed in the hands of attorney to collect, the maker is liable for the fees whether the note is paid in cash or a new note is executed in lieu of the past due note. The N. I. L. was not cited. Williams v. Dockwiler (N. M.), 145 Pac. 475.

The amount stipulated as an attorney's fee will be assumed to be a proper fee, unless it appears unjust, oppressive or unreasonable, and will be allowed without showing that it was paid or agreed to be paid. Utah Nat. Bank v. Nelson, 38 Utah, 169, 111 Pac. 907, S. C. sec. 25.

The provision for an attorney's fee is valid, subject to the power of the court to reduce it, if it be unreasonable in amount or unconscionable. The N. I. L. was not cited. Triplett v. Second Nat. Bank, 121 Va. 189, 92 S. E. 897; see also, Colley v. Summers, etc., Co., 119 Va. 439, 89 S. E. 906, *infra,* p. 14.

A clause in a note agreeing to pay ten per cent. attorney's fees and all expenses of collection, is valid, but nevertheless only a reasonable amount will be allowed. The N. I. L. was not cited. Holstrom Nat. Bank v. Wood, 125 Tenn. 6, 140 S. W. 31.

A stipulation in a note to pay "all costs of collection," authorizes the collection in an action on the note of a reasonable attorney's fee. Letcher v. Wrightsman (Okl.), 158 Pac. 1152.

A stipulation in a note for ten per cent. attorney's fees if the note is placed in the hands of an attorney for collection, is a stipulation for liquidated damages and such fees are recoverable, in an action on the note, without proof they were incurred. First Nat. Bk. of Vicksburg v. Mayer, 129 La. 891, 57 So. 308. But in Florence Oil, etc., Co. v. Hiawatha Gas, etc., Co., 55 Colo. 378, 135 Pac. 454, it was said that when the question is properly raised, the holder can only recover such part of the stipulated amount as will reimburse him for the reasonable and necessary attorney's fees he has been compelled to pay or has become liable for in enforcing collection of the note. It was also said in this case that the adoption of this provision in the N. I. L. is an implied recognition that such stipulations are valid, there being no statute to the contrary.

A demand note provided for attorney's fees in case of suit. A demand of payment should be made to entitle the holder to recover attorney's fees as special damages. Hodges v. Blaylock, 82 Ore. 179, 161 Pac. 396, S. C. sec. 74.

Under the law of Maryland a clause in a note agreeing to pay five per cent commission for collecting it, if not paid when due, was construed to mean such commissions to the extent of five per cent. in case the holder reasonably had to incur liability for and pay such commissions, but not otherwise. Chestertown Bank v. Walker, 163 Fed. 510, 90 C. C. A. 140. The N. I. L. was not cited in this case.

A provision in a note for an attorney's fee, but leaving blank the amount thereof, amounts to a promise to pay a reasonable sum as an attorney's fee, and does not render the note non-negotiable. Where plaintiff employed an attorney, it is sufficient to show what is a reasonable fee, and it is not necessary to prove an express agreement as to fees, or that plaintiff paid the attorney before suit. McCormick v. Swem, 36 Utah 6, 102 Pac. 626.

If authority is given to fill blanks when the instrument is delivered, a reasonable sum may be inserted without avoiding the instrument. Kramer v. Schnitzer, 268 Ill. 603, 109 N. E. 695.

A note on a printed blank stated that the maker "agrees to pay ——— dollars for attorney's fees, etc." *Held,* that no attorney's fees were recoverable. The N. I. L. was not cited. Scandinavian-American Bank v. Long, 75 Wash. 270, 134 Pac. 913.

A stipulation in a note secured by a chattel mortgage for an attorney's fee is valid and enforceable, and the fee may be recovered whether the action is on the note and to foreclose the chattel mortgage, or is in replevin upon the note and mortgage. First Nat. Bank v. Howard (Okl.), 158 Pac. 927.

Where the jurisdiction of a court depends on the amount involved, the attorney's fees promised in the note, sued for and demanded in the declaration are to be included in determining said amount. Ring v. Merchants' Broom Co., 68 Fla. 515, 67 So. 132; Exchange Bank v. Apalachian Land & Lumber Co., 128 N. C. 193, 38 S. E. 813, *contra.*

The reasonable attorney's fees under the contract of the maker and indorser of a note to pay such fees, if recoverable at all, are recoverable as part of the contractual obligation and not as part of the costs. Schillinger v. Leary (Ala.), 77 So. 846.

An attorney's fee provided for in a note is a constituent part of the obligation, enforceable by or in behalf of the holder, and is not to be considered as a distinct obligation or penalty to be enforced in behalf of the attorney or as a separate cause of action. The liability of one who assumes payment of such note includes liability for the attorney's fee. The N. I. L. was not cited. Merrimon v. Parkey, 136 Tenn. 645, 191 S. W. 327.

If plaintiff secures a judgment on the note without providing for the costs of collection and attorney's fees, he can not recover them in another action, the contract having become merged in the judgment. The N. I. L. was not cited. Sands v. Roller, 118 Va. 191, 86 S. E. 857.

But it was held in First State Bank v. Cohasset Wooden Ware Co. (Minn.), 161 N. W. 398, not citing the N. I. L., that a general denial does not put in issue the reasonable value of attorney's fees stipulated for in the note. The claim therefor is not part of the cause of action on the note. They do not accrue until the services are performed and their value may then be determined by the court on application.

Where the note expressly stipulates that "attorney's fees in addition to other costs" might be recovered in the event of suit, attorney's fees were properly taxable as costs although not enumerated in Rev. Code, section 7169, declaring the items properly taxable as costs. The N. I. L. was not cited. Bovee v. Helland, 52 Mont. 51, 156 Pac. 416.

The note provided for an attorney's fee of ten per cent. The trial court did not submit the question of attorney's fee to the jury who returned a verdict only for the amount of principal and interest. *Held,* that it was not error to add ten per cent in rendering judgment. Fatoransky v. Pope, (Okl.), 157 Pac. 905. Where the matter of the attorney's fee was submitted to the jury and the verdict was specifically for an amount without including attorney's fees. *Held,* it was error for the trial court not to add the stipulated ten per cent. for attorney's fees, and if it fails to do so the Supreme Court is justified in so doing. Continental Gin Co. v. Sullivan, 48 Okl. 332, 150 Pac. 209.

The right to recover attorney's fees stipulated for in the note passes to the indorser with the note. The N. I. L. was not cited. Winn Parish Bank v. White Sulphur Co., 133 La. 282, 62 So. 907.

An indorser is liable for the attorney's fees especially where he waives demand, protest and notice. So also is a guarantor. Franklin v. The Duncan, 133 Tenn. 472, 182 S. W. 230, Ann. Cas. 1917C, 1080.

The indorsee of a note containing a stipulation for an attorney's fee sued his indorser and the maker and recovered a judgment in

which no attorney's fee was included. The indorser paid the judgment and sued the maker for the amount of the note and costs and an attorney's fee. *Held*, that he could not recover the attorney's fee. If the action was on the assigned judgment it carried no fee. If on the note, it was a suit on the note as paid, because assigned it could not be after it was merged in a judgment. The N. I. L. was not cited. Balkema v. Grolinund, 92 Wash. 326, 159 Pac. 127.

The statute provides that provisions for attorney's fees do not destroy the negotiability of the note, yet it does not change the law in those states where previously such provisions were held void as against public policy, either as constituting a penalty or as making the note usurious. Miller v. Kyle, 85 Ohio St. 186, 97 N. E. 372, 74 Cent. Law J. 289; Raleigh Co. Bank v. Poteet, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915B, 928 (a valuable note with many cases); First Nat. Bank v. Sanders, 77 W. Va. 716, 88 S. E. 187; Bank of Holly Grove v. Sudbury, 121 Ark. 59, 180 S. W. 470; Exchange Bank v. Appalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813.

A note made in Virginia and payable in New York where at common law and under the N. I. L. a provision for an attorney's fee was not void, is governed by the law of New York, the place of performance, even if it would not be valid in Virginia, as to which, *quaere?* Oglesby v. Bank of New York, 114 Va. 663, 77 S. E. 468, 19 Va. Law Reg. 122; but Carsey v. Swan, 150 Ky. 473, 150 S. W. 534, seems *contra*, the N. I. L. not being cited.

Such a provision in a note both made and payable in another State where such provision is valid will be enforced in New York. The N. I. L. was not cited. First Nat. Bank v. Fleitman, 168 App. Div. 75, 153 N. Y. Supp. 869. But where a note was sued on in North Carolina, where such a provision was invalid,[1] it was held void although the note was executed and payable in Georgia. Such a provision was not a part of the indebtedness but a penalty or a stipulation for liquidated costs in event a suit was necessary. The N. I. L. was not cited. Exchange Bank v. Appalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813.

The question as to the validity of a stipulation for attorney's fees in a promissory note being unsettled in Virginia, it was held that in view of the purpose and policy of the Negotiable Instruments Law and the course of decision in other States, such a stipulation should be regarded as valid. Colley v. Summers, etc., Co., 119 Va. 439, 89 S. E. 906, see 2 Va. Law J. N. S. 321.

An Ohio court will enforce, and under the full faith and credit clause of the Federal Constitution must enforce, a judgment rendered in Pennsylvania, on a cognovit note made and payable in Pennsylvania, though the note contained a provision for an attorney's fee, and though such fee is included in the judgment; such a provision being valid in Pennsylvania, though against public

[1] See added section to North Carolina Act, *supra*, p. 9.

policy in Ohio. Westwater v. Murray, 245 Fed. 427, 157 C. C. A. 589.

Sec. 3. When Promise is Unconditional.

An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; (*a*) or
2. A statement of the transaction which gives rise to the instrument. (*b*)

But an order or promise to pay out of a particular fund is not unconditional.

(*a*) An order drawn by the X Company directing payment of a certain sum, "on account of contract between you (the drawee) and the X Company" was held negotiable, the words "on account of" not having the same effect as "out of the proceeds of." First Nat. Bank v. Lightner, 74 Kans. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353.

An instrument ordering payment of a certain sum and also directing the drawee "to charge the same against the $2,000 insurance draft issued by D. Alexander of the Woodman Circle in my favor, the same being the balance of my account with him," is payable absolutely and not out of a particular fund. Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996, S. C. secs. 87, 132.

A recital in a note, "value received as per contract," does not make the contract part of the note, so as to destroy its negotiability. The words "as per contract" might well lead one not charged with actual notice to understand that they merely referred to the consideration of the note. Nat. Bank of Newbury v. Wentworth, 218 Mass. 30, 105 N. E. 626.

An indorsement of the words "per contract" on the back of a note written at the time of its execution does not affect the negotiability of the note, but they constitute notice of what fair inquiry would disclose. Where, however, a contract accompanied the note and passed to the purchaser, which gives the maker no defense, the purchaser is not charged by such words with knowledge of another agreement giving a defense. The N. I. L. was not cited. Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643, S. C. sec. 55.

The words in a note "value received, with interest as per contract on Nov. 12, 1915;" do not express a contingency as to payment, or refer to a fund out of which the note is to be paid, and therefore, do not render the note non-negotiable. Such words are merely a reference to the transaction out of which the note grew. The N. I. L. was not cited. Waterbury-Wallace Co. v. Ivey, 99 Misc. 260, 163 N. Y. Supp. 719. In determining whether reference to a contract destroyed the negotiability of a note, the court must confine its examination to the note itself. *Ib.*

An order to pay on or before a fixed day and "charge the same to the $1,800 payment," is not conditional. Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782.

A note, negotiable in form, with the addition of "This note is given to take up the freight and rehandling of N. P. car 43607, and proceeds from resale of said car shall apply on this note," is negotiable as it is not payable only out of the proceeds of resale. First Nat. Bk. of Snohomish v. Sullivan, 66 Wash. 375, 119 Pac. 820, Ann. Cas. 1913C, 930.

Bonds of a township, negotiable in form, are not made non-negotiable because the act authorizing their issue provided for a special tax to pay interest, and created a sinking fund to pay the bonds at maturity, but limited the tax to a certain percentage on the property. This may affect the value of the bonds but does not affect the ultimate liability for their payment in full. Commissioners of Cleveland Co. v. Bank of Gastonia, 157 N. C. 191, 72 S. E. 996.

A note given to a life insurance company and providing that in case of the death of the insured before maturity the amount with interest shall be deducted from the amount of the policy, is not conditional. It merely indicates a particular account out of which the holder is to reimburse himself. Union Bank v. Spies, 151 Iowa 178, 130 N. W. 929, S. C. secs. 8-4, 41.

An instrument in the form of a letter from the defendant to the general agent of a life insurance company, acknowledging receipt of a policy of life insurance, and authorizing and directing the agent to place the policy in force from the date of the letter and promising to pay him or his order the first annual premium in specified items, is a negotiable instrument. Equitable Trust Co. v. Taylor, 146 App. Div. 424, 131 N. Y. Supp. 475; Equitable Trust Co. v. Newman, 146 App. Div. 953, 131 N. Y. Supp. 1113; reversing judgment, 72 Misc. 52, 129 N. Y. Supp. 259, and affirming judgment in 69 Misc. 494, 127 N. Y. Supp. 243; Equitable Trust Co. v. Were, 74 Misc. 469, 132 N. Y. Supp. 351, accord.

Conf., Equitable Trust Co. v. Harger, 258 Ill. 615, 102 N. E. 209, in which case the letter claimed to constitute a promissory note was written and delivered before the N. I. L. went into effect in Illinois.

An instrument in the form of a letter reciting that the defendant authorized and requested the general agent of the plaintiff com-

pany to pay the first premium for the defendant, in order to put a policy of life insurance into being, and promising to pay to the general agent or order the amount so advanced ($70.84) in stated installments, is not a negotiable instrument, the obligation to pay being contingent upon payment by the general agent of the first premium. Even if he paid it, it would not be enough, for negotiability must be apparent on the face of the instrument. Equitable Trust Co. of N. Y. v. Howe, 72 Misc. 46, 129 N. Y. Supp. 112.

After a note which was negotiable in form, the parties signed the following written agreement on the same paper: "It is herein provided and agreed that the above note is to be paid from the proceeds obtained from the sale of lots in the town of Vanors * * *, and that one-fourth of the proceeds of all sales of the lots * * * are to be applied to the payment of said note and interest and until the same is paid." Plaintiff, an indorsee, sued the maker on the note. It appeared that all the lots had been sold and the proceeds were not sufficient to pay the note in full. *Held*, that the promise to pay was unconditional and that plaintiff could recover. Van Tassel v. McGrail, 93 Wash. 380, 160 Pac. 1053.

ENGLAND—

A bill of exchange is not made non-negotiable because it contains the words "charge to my account and credit according to a registered letter I have addressed to you." These words do not mean according to the conditions mentioned in the letter, but merely charge my account and credit according to the letter. *In re* Boyse, 33 Ch. Div. 612.

(*b*) AMES: If taken literally, this subsection is mischievous because it might make negotiable a note with the words "given as collateral security for A's debt to the payee," contrary to several decisions. And *quaere* whether it would not apply to a note with a statement that it is given for a chattel, which is to be the property of the payee until the note is paid, as to the negotiability of which there is a conflict.

BREWSTER: Admits that the provision was intended to apply to a "chattel note."

MCKEEHAN: Sees no danger that courts will construe the subsection as covering a note given as collateral. He also doubts its application to the so-called "chattel notes," and regards it as only a codification of the rule, that an indication of the nature of the transaction does not make the instrument conditional.

National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428, S. C. sec. 1-2; Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 63,

92, 184; Fulton v. Varney, 117 App. Div. 572, 102 N. Y. Supp. 608, S. C. sec. 1-4; Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308; Western Farquhar Machine Co. v. Barnett, 82 Ore. 174, 161 Pac. 384, S. C. sec. 4-2; Coleman v. Valentine (S. D.), 164 N. W. 67.

A notation under the maker's signature to an ordinary promissory note "for payment under contract of given date," was construed as a mere statement or reference to a transaction for identification, and, therefore, did not impair the negotiability of the note. Slaughter v. Bank of Bisbee, 17 Ariz. 484, 154 Pac. 1040.

A check to the order of X with the words in the lower left-hand corner "For Wilkes, this check may not be paid unless the object for which it is drawn is stated," is not conditional. If the object is not stated, it is not a check, but if it is stated, the order to pay is absolute. Brown v. Cow Creek Sheep Co., 21 Wyo. 1, 126 Pac. 886, S. C. sec. 185.

An instrument, in other respects a negotiable promissory note, contained a statement that the signers purchased a horse from the payee and authorized the delivery thereof to any one of the signers. Also that the whole sum, which was payable in installments, should become due at the option of the holder if not paid with interest as provided, and also that attorney's fees should be paid in case of suit. *Held,* these provisions did not make the instrument non-negotiable. First Nat. Bank v. Barrett, 52 Mont. 359, 157 Pac. 951.

"I shall pay to the order of the American Hoist & Derrick Co., on, etc., $2,340, for amount of the second installment agreed on of a crane of their manufacture, purchased on this date, according to specifications of their representative, * * *." *Held,* a negotiable note. Merchants' Nat. Bk. v. Santa Maria Sugar Co., 162 App. Div. 248, 147 N. Y. Supp. 498, S. C. sec. 52-3.

A promissory note given for a chattel, and stipulating that the title to the chattel shall remain in the vendor-payee until the note is paid, is not conditional, and the maker is liable thereon although the chattel was destroyed before the maturity of the note. The N. I. L. was not mentioned. Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214. See *infra,* pp. 421, 422, 437, 477, 478, and also the following cases.

An instrument is not deprived of negotiability because it retains the title to the property described therein as security for its payment. Citizens' Nat. Bank v. Bucheit (Ala), 71 So. 82, S. C. secs. 25, 60.

A note otherwise negotiable in form, reserving title to the automobile for which the note was given, until fully paid, and providing that if destroyed before being paid for, the vendee shall bear the loss—and providing for an attorney's fee—is negotiable. *Ex parte* Bledsoe, 180 Ala. 586, 61 So. 813.

A note payable to the order of X which contains a provision that it is given subject to the approval of X for property received of X, and that the title to said property shall remain in X until the note is paid, is not negotiable. Worden Grocer Co. v. Blanding, 161 Mich. 254, 126 N. W. 212. The court did not cite the N. I. L., and followed the case of Sloan v. McCarty, 134 Mass. 245, upon this disputed question.

The note sued on contained the following clause: "Payee's ownership of goods account of which this note is given, the account thereof and contract condition of original sale are not affected by accepting this note until receipt of full amount due thereon." It was shown that the goods actually remained in the possession of the payee. *Held,* "ownership" meant both title and possession, and so the note showed a real conditional sale and not a mere security transaction and was not negotiable. Fleming v. Sherwood, 24 N. D. 144, 139 N. W. 101, 43 L. R. A. (N. S.) 945.

In Reynolds v. Vint, 73 Ore. 528, 144 Pac. 526, and in Western Farquhar Machine Co. v. Burnett, 82 Ore. 174, 161 Pac. 384, the notes stated that they were given for the purchase of property, the title to which was reserved in the payee. The court did not pass upon this question, but held the notes not negotiable because they authorized the payee to take possession of the property and declare the notes due if the payee at any time felt insecure. *Infra,* sec. 4-2.

A note otherwise negotiable in form contained the words, "Rent for month of August, 1915, for part of brick building, etc., as per contract, dated March 24, 1913." *Held,* that though the statement as to rent did not impair the negotiability of the note, the stipulation, "as per contract dated March 24, 1913," operated to qualify the unconditional promise to pay and subjected it to the conditions imposed by the contract and to the law which in certain contingencies relieves the lessee of the obligation to pay, and that the note was therefore not negotiable. Continental Bank, etc., v. Times Pub. Co., 142 La. 209, 76 So. 612.

An instrument contained an order for specified goods, and at the end of it was a promissory note in negotiable form, the signatures to which were the only signatures to the instrument. The note was capable of being detached, and was detached and transferred by defendant. *Held,* that the instrument as originally written was not a promissory note, that the detachment of the note part was a material alteration, and that defendant was guilty of forgery. State v. Mitton, 37 Mont. 366, 96 Pac. 926.

An instrument which begins with an order for goods at a certain price, to be shipped to a city in another State at a certain time, and ends with a promise to pay the price at a certain place 180 days after date, is not a negotiable promissory note, since the promise was conditional on acceptance of the order and shipment of the goods. Neylus v. Port, 46 Pa. Supr. Ct. 428.

The fact that the word "cotton" was printed or lithographed on the form of a draft, which was accompanied by bills of lading, does not make the draft conditional on the genuineness of the bills

of lading. Springs v. Hanover Nat. Bk., 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241, S. C. sec. 62. But in Guaranty Trust Co. v. Grotian, 114 Fed Rep. 433, 52 C. C. A. 235, where a bill of exchange payable sixty days after sight and containing the words "and charge the same to account of, 8417 bushels flaxseed, etc.," was accepted as follows: "Accepted, payable at Lloyd's Bank, against indorsed bills of lading for 8417 bushels of flaxseed per Buffalo S. S. at New York, etc.," it was held, that this acceptance was conditional on the delivery of genuine bills of lading. And in Hannay v. Guarantee Trust Co., 187 Fed. Rep. 686, where the plaintiff accepted generally a draft containing the provision, "charge the same to the account of R. S. M. I., 100 bales of cotton," with what purported to be a bill of lading for the cotton attached, it was held that the acceptance of the draft was conditional on the genuineness of the bill of lading. For fuller statement and discussion of the three foregoing cases and also for the subsequent history of the last mentioned case, see sec. 62, *infra*, p. 227.

The defendants indorsed notes as follows: "The undersigned indorsers assume the contract shown by the face of this note payable from Pass Aux Heron U. S. Government Contract to be completed about June 1, 1914." *Held*, that these were qualified indorsements and that the defendants' liability was limited to the fund and conditioned upon its sufficiency to pay the notes, although as to the maker, the notes were negotiable instruments. People's Bank v. Moore (Ala.), 78 So. 789.

In Lebrecht v. Nellist, 184 Mo. App. 335, 171 S. W. 11, a notation on a note read: "For a thousand shares of the capital stock X Co., par value $1 per share—stock not yet delivered." The court declined to consider the question as to whether this notation made the note non-negotiable, since the case was tried upon another theory.

Sec. 4. Determinable Future Time—What Constitutes.

An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable,(*a*)

1. At a fixed period after date or sight; (*b*) or
2. On or before a fixed or determinable future time specified therein;[1] [2] (*c*) or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.(*d*)

[1] Not in B. E. A.

[2] For an exhaustive discussion of the questions arising under this subsection, see Chafee Acceleration Provisions in Time Paper, 32 Harvard Law Rev. 747.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.[1]

The Wisconsin Act substitutes, for the last paragraph, the following: "4. At a fixed period after the date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided."

(*a*) Union Stockyards Nat. Bank v. Bolan, 14 Idaho, 87, 93 Pac. 508, 125 Am. St. Rep. 146, S. C. sec. 184; Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383, S. C. secs. 7-1, 71, 73; Wray v. Miller (Misc. Rep.), 120 N. Y. Supp. 787, S. C. sec. 1-3.

(*b*) An agreement to extend a note without defining the period to which it would be extended, is not a valid extension, and the holder has the right to demand payment at any time after the principal or interest became due. The N. I. L. was not cited. Lanum v. Harrington, 267 Ill. 57, 107 N. E. 826.

A note payable at a fixed date is not made non-negotiable by a provision "that if the crops on section 25 is below eight bushels per acre for 1905, this note shall be extended one year." State Bank of Halsted v. Bilstad, 162 Iowa, 433, 136 N. W. 204, 49 L. R. A. (N. S.) 132.

(*c*) Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 63, 184 192; Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223, S. C. sec. 1-3; Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. sec. 1.

A note for $100, payable on or before September 2, 1910, had marginal notations as follows: "$25 will be paid Nov. 1, 1909, $25 will be paid Jan. 1, 1910." *Held*, the maturity of the note was September 2, 1910, and that the marginal notations did not control the time of payment, as stated in the body of the note, and that the note was not dishonored by non-payment of the sums mentioned in the marginal memoranda before maturity. The N. I. L. was not cited. Union State Bank v. Benson, 38 N. Dak. 396, 165 N. W. 509.

In Pierce v. Talbot, 213 Mass. 330, 100 N. E. 553, it was held that a note payable in three years with the privilege of anticipating payment in whole or in part, is not negotiable. The date

[1] "An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect." B. E. A. s. 11 (2).

of the note does not appear. But the note was negotiable both under section 4-2 of the N. I. L. and under Massachusetts statute of 1888, c. 329, both of which the court seems to have overlooked, as well as the case of Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363, which held such a note to be negotiable under the statute of 1888.

A note declaring that whenever the payee deems it insecure, he may declare it due, even before maturity, is not negotiable. Reynolds v. Vint, 73 Ore. 528, 144 Pac. 526, S. C. sec. 3-2; Western Farquhar Machine Co. v. Burnett, 82 Ore. 174, 161 Pac. 384, S. C. sec. 3-2; Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1, S. C. sec. 5. *Cf.*, Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 63, 184, 192.

A note payable at a fixed date but with a provision that "this note shall become due and payable on demand at the option of the payee, when it deems itself insecure," is not negotiable. The word "contingency" refers to contingency as to time, though it may also refer to other contingencies. Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870. Such a note is not a demand note within sections 1-3 and 53. *Ib.*

Notes, payable at a certain time, but secured by a mortgage executed as part of the same transaction, and reciting that the whole debt shall be due in case of sale or removal of the property by the mortgagor without the consent of the mortgagee, or in case the mortgagee deems himself insecure, are uncertain as to time and amount of payment and are therefore not negotiable. Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237, S. C. sec. 56.

A clause in a mortgage securing a note, that the mortgagee may declare the debt due for breach of stipulations in the mortgage, does not render the note non-negotiable for uncertainty as to time of payment. Iowa Nat. Bank v. Carter, *supra*, distinguished on the ground that in that case the mortgage provided that the note should become due and payable at the election of the holder, independently of any default by the maker. Des Moines Sav. Bank v. Arthur, 163 Iowa, 205, 143 N. W. 556, Ann. Cas. 1916C, 498, S. C. sec. 1-2.

Where notes otherwise negotiable in form were secured by a mortgage, their negotiability was not destroyed by a provision of the mortgage that in the event of certain contingencies the whole sum for which the notes were given might be declared due and payable. Smith v. Nelson Land & Cattle Co., 212 Fed. 56, 128 C. C. A. 512, S. C. secs. 25, 58, 184, 191.

A provision in a note that "if default is made in the payment of any note, or the machine is levied upon or the undersigned attempts to sell or remove the same the company (payee) may declare all notes due," does not render the note non-negotiable on account of uncertainty as to time of payment. Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524, S. C. sec. 38.

Considered only with reference to the time of payment, a provision of a note accelerating maturity on account of non-payment of taxes, etc., will not render the note non-negotiable. Bright v. Offield, 81 Wash. 442, 143 Pac. 159, S. C. sec. 5.

(*d*) The maker promised to pay G or order, a certain sum, twelve months after the maker should become the owner of lands already conveyed to him by his father, reserving a life estate therein to the father. *Held,* to be a negotiable instrument, the contingency being certain to happen. The N. I. L. was not cited. McClenathan v. Davis, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017.

Sec. 5. Additional Provisions Not Affecting Negotiability.

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.(*a*) But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity;[1](*b*)
2. Authorizes a confession of judgment if the instrument be not paid at maturity;[2](*c*) or
3. Waives the benefit of any law intended for the advantage or protection of the obligor;[3](*d*) or
4. Gives the holder an election to require something to be done in lieu of payment of money.[3](*e*)

But nothing in this section shall validate any provision or stipulation otherwise illegal.

The North Carolina Act qualifies subsection 2 (see *supra,* p. 9, under section 2).

[1] "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof." B. E. A. s. 83 (3). The B. E. A. appears to make no similar provision as to bills.

[2] Not in B. E. A.

[3] Not in B. E. A., except that section 16 (2), provides that the drawer of a bill and any indorser may insert therein an express stipulation "waiving as regards himself some or all of the holder's duties."

The Illinois Act adds the words "under this Act," at the end of the first sentence, and omits the words "if the instrument be not paid at maturity," in subsection 2.

The Kentucky Act omits subsection 3.

The Illinois and Wisconsin Acts add to the last paragraph: "Or authorize the waiver of exemptions from execution."

(*a*) Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 63, 184, 192.

A note otherwise negotiable in form but promising to pay money and wheat, is not negotiable. Thomson v. Koch, 62 Wash. 438, 113 Pac. 1110.

A provision that if collateral declines in value the maker will furnish additional securities and that in default thereof the note shall become due and payable, renders the note non-negotiable. Hibernia Bank v. Dresser, 132 La. 532, 61 So. 561, S. C. sec. 63; Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D 1, S. C. sec. 4. The instrument is not negotiable because (1) it contains a promise to do an act in addition to the payment of money, and (2) the date when it is to become due is uncertain. But Finley v. Smith, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777, S. C. sec. 19, is *contra*, holding that such a provision merely hastens the date of maturity and in effect is similar to a provision that a failure to pay interest will make the note immediately due.

And in Empire Nat. Bank v. Highgrade Oil, etc., Co. (Pa.), 103 Atl. 602, also, it was held that the fact that a note otherwise negotiable contains an independent contract entitling the holder to call for additional security and providing that upon failure to furnish it the note shall be due and payable, does not make the time of payment so uncertain as to destroy its negotiability.

A note contained a provision accelerating the maturity if the maker failed to pay taxes, rates or assessments on the property, mortgaged to secure the note, or allowed taxes to be levied against the holder on account of the note. *Held*, that this bound the maker to pay the taxes, etc., and was a promise to do other things in addition to the promise to pay a certain sum of money and rendered the note non-negotiable. Bright v. Offield, 81 Wash. 442, 143 Pac. 159, S. C. sec. 4-2.

A certificate of indebtedness containing in addition to a promise to pay money an agreement to keep free from incumbrance property, on which the value of collateral pledged for security of the instrument, depends, is not a negotiable instrument. The certificate was issued before the Negotiable Instruments Law was adopted in New Jersey, but the court said that section 5 of that act was the same as the common law. Strickland v. National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828. An opposite result as to the nego-

tiability of the same form of certificate was reached in the Federal Circuit Court of Appeals, Second Circuit (N. Y.), where the N. I. L. was in force before the date of the certificate, but the point in question does not appear to have been raised or discussed in that case. National Salt Co. v. Ingraham, 143 Fed. 805, 74 C. C. A. 479.

A note otherwise negotiable in form, executed in Missouri, recited a pledge of collateral security for its payment, and provided that, if in the opinion of the holder the security should at any time depreciate in value, the maker should on demand deliver additional security to the satisfaction of the holder, otherwise the note to mature at once. *Held*, that the negotiability of the instrument was to be determined by the law of Missouri, and in the absence of a construction of the Missouri statute upon this point by the court of last resort in Missouri, the Federal courts were bound to follow the decision of the Supreme Court in Chicago Railway Equipment Co. v. Merchants Nat. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. ed. 349, in holding that such a provision did not destroy the negotiability of the instrument. Citing also, and following Kennedy v. Broderick, 216 Fed. 137, 132 C. C. A. 381, and refusing to follow Lincoln Nat. Bank v. Perry, 66 Fed. 887, 14 C. C. A. 273. Citing the N. I. L. generally and saying that on this point it merely reaffirms the law merchant. Kobey v. Hoffman, 229 Fed. 486, 143 C. C. A. 554.

(*b*) A note, reciting that the title to property for which it is given shall remain in the payee, and that he shall have the right to declare the money due and take possession of the property whenever he may deem himself insecure, "even before the maturity of the note," is not negotiable. Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185.

(*c*) A note which contains a provision authorizing a confession of judgment at any time thereafter, whether due or not, is not negotiable. First Nat. Bank v. Russell, 124 Tenn. 618, 139 S. W. 739, Ann. Cas. 1913A 203; Volk v. Shoemaker, 229 Pa. 407, 78 Atl. 933; Wisconsin Yearly Meeting v. Babler, 115 Wis. 289, 91 N. W. 678. Nor is a note containing an authority to confess judgment "as of any term." Milton Nat. Bank v. Beaver, 25 Pa. Super. Ct. 494; Yankolivitz v. Wernick, 20 Pa. Dist. Rep. 223, 59 U. of P. Law Rev. 573.

(*d*) The words "without defalcation" in a negotiable bill or note are now mere surplusage and without meaning, under the Negotiable Instruments Law, and hence do not constitute a waiver of rights of set-off or counterclaim. The N. I. L. was cited only generally. First Nat. Bank of Rocky Ford v. Lewis, 57 Colo. 125, 139 Pac. 1102. *Sed quaere?* It does not follow because in some states promissory notes, in the absence of such a clause, were not negotiable in the sense of cutting off defenses between the original parties, as against a holder in due course, that when the words

are used in a note, which is fully negotiable without them, they may not have the effect of waiving rights of set-off or counterclaim, which could otherwise be asserted as against one who took with notice or after maturity. The Negotiable Instruments Law, in section 5-3, recognizes the use, in negotiable instruments, of provisions which waive the benefit of any law intended for the advantage or protection of the obligor, and statutes of set-off and counterclaim seem to come within the description of such laws. For the history of this provision for payment "without defalcation," which is still used in some states, the following cases may be consulted. London v. Tiffany, 5 W. & S. 367; Houk v. Foley, 2 P. & W. 245, 4 Halsted's Law, 120; Youngs v. Little, 3 Green's Law, 1; Cumberland Bank v. Hann, 3 Harrison, 222; McDonald v. Lee's Admr., 12 La. 435; Council Bluffs v. Cuppey, 41 Iowa, 104.

(*e*) A provision in a bond, otherwise negotiable, entitling the holder, at his option, to receive money or stock of the corporation-maker, does not destroy the negotiability of the bond. Pratt v. Higginson (Mass.), 119 N. E. 661.

Sec. 6. Omissions—Seal: Particular Money.

The validity and negotiable character[1] of an instrument are not affected by the fact that—

1. It is not dated;(*a*) or
2. Does not specify the value given, or that any value has been given therefor;(*b*) or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal;[2](*c*) or
5. Designates a particular kind of current money in which payment is to be made.[3](*d*)

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.[3]

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[1] The English Act omits the words "and negotiable character." B. E. A. s. 3 (4).

[2] "In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal." B. E. A. s. 91 (2).

[3] Not in B. E. A.

The Illinois Act begins subsection 5 with the words, "Is payable in currency or current funds: or," and omits the last paragraph of said subsection.

(*a*) Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756, S. C. sec. 13; Church v. Stevens, 56 Misc. Rep. 572, 107 N. Y. Supp. 310.

(*b*) McLeod v. Hunter, 29 Misc. Rep. 558, 61 N. Y. Supp. 73, S. C. sec. 24.

(*c*) St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145; Arnd v. Heckert, 108 Md. 300, 70 Atl. 416; Clarke v. Pierce, 215 Mass. 552, 102 N. E. 1094.

(*d*) In an article on "Some Necessary Amendments of the Negotiable Inst. Law,"[1] the author, commenting on section 6-5, said that "the question whether an instrument payable in 'currency' or in 'current funds' is payable in money, has given rise to much conflict of authority. On one side are the cases which construe the words 'currency' or 'current funds' to mean legal tender or such currency as, although not legal tender, yet circulates actually and lawfully at par with coin, and therefore to make the instrument payable in money. On the other side are cases in which it is held that any currency or current funds may be tendered in payment whether at par or not, and that the instrument is therefore not payable in money. If the former construction is put upon the words 'currency' or 'current funds,' no objection can be made to regarding the instrument as payable in money, for the amount to be paid is certain. The Negotiable Instruments Law leaves the question unsolved, for in section 6-5 it is simply provided that the validity and negotiable character of an instrument is not affected by the fact that it 'designates a particular kind of current money in which payment is to be made.' What is meant by 'current money'? or rather, what is meant by 'money'? Does it include not only gold and silver coin, but also bank notes, treasury notes and gold and silver certificates? All of them are current and are popularly spoken of as money, but they are not all legal tender.

"It has been suggested that the last paragraph of section 6-5 might be amended so as to read, '* * * is payable in currency or current funds or designates a particular kind of current money in which payment is to be made.' This amendment will make an instrument having the other required formal requisites and payable in currency or current funds negotiable in the states in which the Negotiable Instruments Law is adopted. But it is submitted that such an instrument may not have a uniform value in all such states. For the question still remains, what is meant by

[1] 26 Harvard Law Rev. 493.

'currency' or 'current funds,' and here the courts will decide as they have done in the past. Indeed, the Supreme Court of Iowa,[1] since the adoption of the Negotiable Instruments Law, has held, although without referring to the act, that a check payable 'in current funds' is not negotiable. The court followed former decisions based on the interpretation of the words 'current funds' as including any currency, although it might not be at par with coin.

"In order to make instruments payable in 'currency' or 'current funds' not only negotiable but of uniform rule, the words in question ought to receive the same interpretation everywhere. This can be done by making section 6-5 read as follows:

" '(5) Is payable in currency or current funds or designates a particular kind of current money in which payment is to be made. The words 'currency,' 'current money,' or 'current funds' shall mean such circulating media as are legal tender or are lawfully and actually circulating at par with legal tender at the time and place of payment.' "

Since the foregoing was written, it has been held in New York[2] that an instrument by which the maker agreed to pay to the order of the payee "$2,340 currency," is a "negotiable promissory note" under the Negotiable Instruments Law, and in Connecticut[3] it has been held that where a check had been tendered in payment of rent and was refused and payment "in money" was demanded, that this demand was fairly met by a tender in bills of the currency of the United States, whether such bills were legal tender or not. The N. I. L. was not cited. The conflict thus already apparent seems to make clear the necessity for the amendment of the section in the interest of uniformity.

Sec. 7. When Payable on Demand.

An instrument is payable on demand—

1. Where it is expressed to be payable on demand, or at sight, or on presentation; (*a*) or

2. In which no time for payment is expressed. (*b*)

Where an instrument is issued,[4] accepted, or indorsed when overdue, it is, as regards the person so issuing,[4] accepting, or indorsing it, payable on demand.

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[1] Dille v. White, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510, S. C. sec. 65.

[2] Merchants' Nat. Bank v. Santa Maria Sugar Co., 162 App. Div. 248, 147 N. Y. Supp. 498.

[3] Burritt v. Lunny, 90 Conn. 491, 97 Atl. 756.

[4] The words "issued" and "issuing" are omitted in the English Act. B. E. A. s. 10 (2).

(*a*) A note payable on demand after date, is a demand note, and presentment need not be made the day after date, but only within a reasonable time to hold an indorser. Hardon v. Dixon, 77 App. Div. 241, 78 N. Y. Supp. 106, holding that the Statute of Limitations did not begin to run on such a note until the day after its date, said to have no application. Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. S. 383, S. C. secs. 71, 73.

Defendant indorsed a note which was signed by the maker, but was blank as to date, time of payment and payee. The note was delivered to the plaintiff for value by the maker, who told the plaintiff to fill in the dates at any time she wanted money, because he did not know when he would be able to pay. The maker disappeared nearly three years later, and three months thereafter plaintiff dated the note the day of its delivery to her, and made it payable the day it was filled in, and presented it the same day. *Held*, that the defendant was liable, that the note was not a demand note requiring presentment within a reasonable time after its issue to charge the indorser. But no interest was recoverable, because when a note does not call for interest and there is no blank in which to add the words "with interest," the holder is not authorized to add such words. Usefof v. Herzenstein, 65 Misc. Rep. 45, 119 N. Y. Supp. 290.

(*b*) Didato v. Coniglio, 50 Misc. Rep. 280, 100 N. Y. Supp. 466, S. C. sec. 17-5; McLeod v. Hunter, 29 Misc. Rep. 558, 61 N. Y. Supp. 73, S. C. sec. 24; Riddle v. Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15.

Sec. 8. When Payable to Order.

The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order.[1] It may be drawn payable to the order of—

1. A payee who is not maker, drawer, or drawee;[2] or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly;[3](*a*) or
5. One or some of several payees;[3](*b*) or

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1 "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." B. E. A. s. 8 (4). See also *infra*, p. 353, n. 1, and p. 388 n. 2.

2 Not in B. E. A.

3 "A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees." B. E. A. s. 7 (2).

6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.[1](*c*)

The Illinois Act interpolates after subsection 6 the following: "7. An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate."

(*a*) One of several promisees of a negotiable instrument payable to two or more jointly, may receive payment and cancel or surrender the note. Hence, payment to the survivor of joint payees was proper and discharged the instrument. The N. I. L. was not cited. Park v. Parker, 216 Mass. 405, 103 N. E. 936.

(*b*) Where a note is made payable "to the order of A or B," the indorsement of either is sufficient to pass the title. Voris v. Schoonover, 91 Kan. 530, 138 Pac. 607, 50 L. R. A. (N. S.) 1097.

A note payable to the "R. M. Life Ins. Co. or H. B.," is payable to either, and negotiable by the indorsement of either. Union Bank v. Spies, 151 Iowa, 178, 130 N. W. 928, S. C. sec. 41.

An indorsement of a negotiable promissory note in the words "pay to the order of A or B," does not render the note non-negotiable, and an indorsement by either A or B will pass the title. Page v. Ford, 65 Ore. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A 1048, S. C. secs. 1, 38.

A promissory note was made payable to X or his wife. The husband died and the question was whether the obligation survived to the wife as against the personal representative of the husband, from whom the consideration passed. It was held upon the evidence, that "or" must be construed "and" and that therefore the obligation was joint and survived to the wife, and that section 8-5 does not preclude such construction. Smith v. Haire, 133 Tenn. 343, 181 S. W. 161.

In Passut v. Heubner, 81 Misc. Rep. 249, 142 N. Y. Supp. 546, it was held that a note payable to two persons in the alternative creates a joint interest in the payees, neither of whom can in the lifetime of the other maintain an action on the note without joining the other. One judge dissented. The decision rests entirely on old cases and the court seems to have overlooked section 8-5 of the Negotiable Instruments Law. If the indorsement of either

[1] "When the bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." B. E. A. s. 7 (1).

payee is sufficient to pass the title, there seems to be no reason why either payee may not bring suit on the note.

(*c*) The last clause of this section changes the law. Therefore, when a note was drawn payable to order, but with an unfilled blank for the name of the payee and negotiated in that condition, any bearer who came by it regularly can no longer fill the blank and recover thereon. Tower v. Stanley, 220 Mass. 429, 107 N. E. 1010, S. C. secs. 14, 124; Cf. State v. Hinton, sec. 34, *infra* p. 136 (an indorsement in like form).

Tower v. Stanley seems *contra* to the case of Chamberlain v. Young [1893], 2 Q. B. 206, where it was held that "Pay to —— order" means "pay to my order," and a bill so reading and indorsed by the drawer is a valid bill of exchange.

Sec. 9. When Payable to Bearer.

The instrument is payable to bearer—

1. When is is expressed to be so payable; or
2. When it is payable to a person named therein or bearer;[1] or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;[2](*a*) or
4. When the name of the payee does not purport to be the name of any person;[3](*b*) or
5. When the only or last indorsement is an indorsement in blank.(*c*)

The Illinois Act substitutes for subsection 3 the following: "3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it," and for subsection 5, the following: "5. When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

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[1] Not in B. E. A. Chalmers (6th ed. 25) says "a bill payable 'to J. C. or bearer' is of course payable to bearer."

[2] "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." B. E. A. s. 7 (3).

[3] Not in B. E. A.

(*a*) AMES: Section 9-3 ignores the tenor of the instrument. By this section and section 16, if a note payable to a fictitious payee is stolen from the maker and indorsed by the thief in the name of the payee, the maker would be liable to a holder in due course. The section should be made to read, "If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and endorsed by the drawer or maker respectively."

As a matter of actual experience the maker of an instrument, with a known fictitious payee, does not intend it to be payable to bearer, but always indorses it in the fictitious name before issuing it.

BREWSTER: The case of the stolen note put by Dean Ames would be rare. The section seems to cover common cases, such as notes payable to unincorporated associations, estates of deceased persons and the like. But upon the reply of Professor Ames, that if the section applies to the case of a note payable to a joint stock company incorporated, or to a partnership which is an incorporated association, or to the estate of a deceased person, the provision is still more mischievous, Judge Brewster seems to claim that he used the case merely as an illustration of a common case, without saying that the section applied to such a case.

MCKEEHAN: There are strong arguments in favor of Professor Ames' view. But the section codifies the law since Minet v. Gibson, in 1791. Technically it is wrong to permit the transfer without indorsement of an instrument which appears on its face to require an indorsement for a valid transfer, but there is no great danger in the case of an unindorsed stolen note payable to a fictitious payee, because no one would discount it. If indorsed by the thief to a holder in due course, still the maker's conduct made the fraud possible, and he should bear the loss. An interpretation which would make payable to bearer notes, payable to unincorporated associations or to the estates of deceased persons, would be opposed to reason and authority, and would work much harm. The section does not suggest such a change in the law.

A note payable to "The X Company," which was a firm name under which several persons were doing business, is not payable to a fictitious payee. Write Away Pen Co. v. Buckner, 188 Mo. App. 259, 175 S. W. 81.

Plaintiff, whose real name was Storch, had, on account of trouble with his wife, assumed the name of Krause, and defendant gave a note to plaintiff payable to the order of Krause. *Held,* that this was not a case of fictitious payee and that plaintiff, suing in his own name of Storch, could recover against defendant. Lockland v. Storch, 123 Ark. 253, 185 S. W. 262. The N. I. L. was not cited.

A requested a bank to draw a draft to the order of C Bros., an existing firm, who were ignorant of the transaction. A indorsed the draft in the name of C Bros., and the indorsee collected it from the drawee. *Held,* that the knowledge of the drawer of the fictitious or non-existing character of the payee controls, not the knowledge of the person at whose request the draft is drawn. That the draft was not payable to bearer and that the drawee could recover the money from the indorsee. Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829.

One Keefe, a claim and returned goods clerk in the plaintiff's department store, with the aid of a confederate, prepared and checked false bills for goods purporting to be sold to plaintiff by various sellers, some of whom did not exist, got the bills approved by other clerks and took them to the proper officer who directed a check to be drawn to the order of the supposed sellers, and Keefe took the checks to deliver to the supposed sellers, indorsed the payees' names, and got a friend also to indorse them, and obtained payment from his friend's bank to which the checks were paid by the defendants, the drawee banks. These fraudulent operations covered a period of over five years, more than one hundred and seventy operations and involved over $50,000. Upon discovery of the frauds, plaintiff sued the banks to recover the amounts which had been charged against its account. It was found that the fraud was made possible by negligence on the part of various employes of plaintiff. *Held,* that negligence of plaintiff was not the proximate cause of the checks being paid upon fraudulent indorsements and that the defendant's duty was to pay only to a person authorized to receive the money under the language of the check, and having failed in this duty the defendants were liable to plaintiff. Jordan Marsh Co. v. Nat. Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (the full report of the facts is to be found only in the regular report, the Northeastern Reporter giving only the opinion of the court.)

An employe of a life insurance company falsely drew up proofs of a death, procured the company to draw a check payable to the beneficiary of the policy, forged the indorsement and procured the plaintiff to cash it. The plaintiff thereafter indorsed the check, deposited it in his bank which collected it from the drawee bank. Upon discovery of the fraud, the insurance company returned the check to the drawee, which bank returned it to the plaintiff's bank and he refunded the amount. Thereafter plaintiff brought an action against his bank to recover the payment as made under mistake of fact. *Held,* that plaintiff could not recover. First, because he guaranteed the genuineness of the forged instrument

when he indorsed the check. Second, because the check was not payable to bearer, since there was no proof that the insurance company had knowledge of the fiction. Egner v. Corn Exchange Bank, 42 Misc. Rep. 552, 86 N. Y. Supp. 107.

Where a person obtained a loan, representing himself to be the agent of another and received checks payable to the order of his alleged principal (not a fictitious or non-existent person), the drawer of the check did not vouch for the right of the agent to indorse the name of the payee and may recover from the drawee bank the amount paid on the checks under the forged indorsement of the payee. Goodfellow v. First Nat. Bank, 71 Wash. 554, 129 Pac. 90, 44 L. R. A. (N. S.) 580.

A clerk had a power of attorney to draw checks on his employer's bank account. The clerk fraudulently drew checks to X, an existing person, but who had no interest in the checks and was not intended by the clerk to receive them. The clerk indorsed the name of X and negotiated the checks for his own purposes, and the drawee bank paid them in good faith. *Held*, that the payee was a fictitious person within the section, that the checks were payable to bearer and that the payment by the bank was rightful. Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 Atl. 876, S. C. sec. 124.

The name of the drawer was forged to checks made payable to real persons. It did not appear who the forger was, but he knew that the payees would never have any interest in the checks. The drawee bank paid the checks to defendant, a holder in due course, on the forged indorsement of the payee. *Held*, that the payees were fictitious, that the checks were payable to bearer, and that the drawer could not recover the money from defendant. Trust Company of America v. Hamilton Bank, 127 App. Div. 515, 112 N. Y. Supp. 84. The case is reviewed in 22 Harvard Law Rev. 141.

In Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank, 134 Tenn. 379, 183 S. W. 1006, the court reached the same result but by a different process of reasoning. The manager of plaintiff having authority to draw and issue checks, fraudulently and for his own purposes drew checks payable to persons with whom plaintiff had business dealings, but the manager himself indorsed the checks in the names of the payees and either collected them from defendant, the drawee bank, or negotiated them to other persons to whom the bank paid them. The court held that the bank was not liable to the plaintiff because under section 65 the manager by negotiating the instruments warranted that they were genuine and that by section 23 he and his principal were precluded from setting up the forgery of the names of the payees.

Plaintiffs' agent drew drafts on plaintiffs payable to real persons but not intending them to have any interest therein, indorsed the names of the payees and negotiated the drafts to a holder in due course and plaintiffs paid the drafts. *Held*, the drafts were payable to bearer, that a good title passed to the purchaser and that the plaintiffs could not recover. Bartlett v. First Nat. Bank, 247

Ill. 490, 93 N. E. 337; Noel v. Security Bank of Chicago, 163 Ill. App. 82, accord.

In Jones v. Peoples' Bank Co., 95 Ohio St. 253, 116 N. E. 34, the court while approving Armstrong v. National Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655, gave an *obiter* opinion to the effect that if the person who induces the drawer of a check to make it payable to a fictitious person but whom the drawer believes to be a real person, is an agent of the drawer, the knowledge of such agent is the knowledge of the drawer, and the check would be payable to bearer.

In Equitable Life Assurance Society v. Nat. Bank of Commerce (Mo. App.), 181 S. W. 1176, one Davies, a soliciting agent of plaintiff at Little Rock, Ark., in collusion with other persons, sent in an application for a policy on the life of S. T. Wicker, a non-existing person, which was accepted and a policy issued in favor of Mary J. Wicker, also non-existing. Proofs of the death of the supposed S. T. Wicker were subsequently sent to the company and a check payable to Mary J. Wicker was drawn by plaintiff and sent to the agent, who took it to a Mrs. Munn, who indorsed it, "Mary J. Wicker," and the agent went with a son of Mrs. Munn to a bank in Magnolia, Ark., introduced him as a relative of Mrs. Wicker, and said that he was authorized by Mrs. Wicker to get the check cashed. Thereupon the Magnolia bank cashed the check and the agent got a part of the money. The Magnolia bank sent the check through other banks to the defendant, the drawee bank, which paid it. Upon discovery of the fraud plaintiff sued defendant for the money. It was held, that whether the case was governed by the common law or by the Negotiable Instruments Law, which was not shown to have been adopted in Arkansas, although it had been in Missouri, the plaintiff was bound by the knowledge of its agent Davies that Wicker was non-existent, and that by plaintiff's act of delivering the check and putting it in circulation, the drawee bank was entitled to the same protection as if the check had been payable to bearer.

It is submitted that this case is erroneous both as to its statement of the common law and as to its reasoning.

The opinion in this case as to the common law is based on section 139 of Daniels' Negotiable Instruments, to the effect that the maker by making the note payable to a fictitious person avers his existence and is estopped as against a holder ignorant of the contrary to assert the fiction, although the maker himself may be ignorant of it. This section in the first edition was based on the case of Lane v. Krekle, 22 Iowa, 404, in which, however, the note was payable to a fictitious person "or bearer," so that, of course, the title would pass by delivery whether there was an indorsement of the name of the fictitious payee or not. But the court did give an *obiter* opinion to the same effect as that expressed in section 139 of Mr. Daniels' book. Then Kohn v. Watkins, 26 Kan. 691, followed the *dictum*, quoting Lane v. Krekle, and the passage from Mr. Daniel.

In the last edition of Mr. Daniel's book no other cases to this effect are cited except certain English cases which, however, rest on the Bills of Exchange Act, section 7 (3), which provides that, "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer," which lays down an absolute rule without regard to the knowledge or intention of the drawer.

With the exception of the *dictum* in Lane v. Krekle and the judgment in Kohn v. Watkins, the American rule has been that an instrument payable to a fictitious or non-existing person is payable to bearer only when this fact is known to the person making it so payable. Armstrong v. Bank, 46 Ohio St., 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Chism v. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778 (indorsement to fictitious person, the indorser being ignorant of the fiction).

Fifth Nat. Bank v. Central Nat. Bank, 82 Hun. 559, affirmed 152 N. Y. 636.

Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, and in Jordan Marsh & Co. v. Nat. Shawmut Bank, *supra,* the Supreme Court of Massachusetts said that at common law as well as under section 9-3 of the Negotiable Instruments Law, an instrument payable to a fictitious payee is not payable to bearer unless the maker knows that the payee is fictitious or non-existing.

It also seems illogical to say that an instrument is payable to bearer because the maker is estopped to assert that the payee is fictitious. How does it follow that anyone should take title by mere delivery when he takes an instrument which on its face is made payable to the name of a person and therefore by its terms calls for an indorsement?

If a man with knowledge of the fiction signs and puts into circulation an instrument payable to a fictitious or non-existing person, it may well be held that, as he knows that there is no one who comes within the description of the payee, and therefore no one to indorse the instrument according to its tenor, and yet intends that the title shall pass and that it shall circulate, he intends or should be estopped to deny that he intends that it shall circulate without indorsement, and by mere delivery, just like an instrument drawn payable to bearer. (In point of fact the maker really intends to make the instrument payable to himself under the fictitious name, and he actually indorses it in that name, and no case has been found in which such an instrument was negotiated without an indorsement in the name of the payee.)

But when the maker believes that the payee is a real person, even if his signing and putting into circulation the instrument payable to a fictitious or non-existing payee, is held to be an admission that the payee is a real person, this does not show that the maker expects and intends the instrument to pass as if made to bearer. Quite the contrary, he intends it to pass only by indorsement, and if there is no such person as the payee, it simply can not pass at all. Any other rule is illogical and unjust, for

the person taking an instrument purporting to be payable to a person without indorsement, is not entitled to consideration, and if it is indorsed by some one in the name of the fictitious or non-existing person the loss to the buyer of such an instrument is not due to the fact that the payee is fictitious or non-existing, but to the fact that the instrument is indorsed by someone who is not authorized to indorse it, either by the maker or by the terms of the instrument, and the indorsee is in such a case no worse off than in the case of the forgery of the indorsement of the name of a real person.

And indeed, the indorsement in the name of the fictitious payee is a forgery. People v. Wardner, 104 Mich. 337, 62 N. W. 405; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N.S.) 514, 126 Am. St. Rep. 467; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131.

As to the argument of the court in the principal case that the knowledge of the fraudulent soliciting agent of the non-existence of the payee was to be imputed to the company and that, therefore, the fact that the check was payable to the order of a non-existing person was known to the person making it so payable, this is rather a question of agency and estoppel than of the application of the statute, but it is to be observed, First, that the knowledge of an agent engaged in defrauding his principal is not imputed to the principal. Second, that it is the knowledge of the agent, making the instrument, which is required, not the knowledge of an agent who has no authority to make the instrument and who in fact does not make it. On this point, as on all the others involved, the case of Jordon Marsh Co. v. Nat. Shawmut Bk., *supra*, is directly opposed to the Missouri case and to the *dictum* in Jones v. Peoples' Bank Co., *supra*, and is, it is submitted, more consonant with sound reason and authority.

See also, Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467; Grand Lodge v. State Bank, 92 Kan. 876, 142 Pac. 974, L. R. A. 1915B, 815, and Grand Lodge v. Emporia Nat. Bank, 101 Kan. 369, 166 Pac. 490.

One is tempted to say of the Missouri case that the court was probably unconsciously affected by a prejudice in favor of the local bank as against a New York insurance company. In the Supreme Court the judgment in this case was affirmed without passing on the question decided in the lower court, solely on the ground that the facts could not be reviewed because declarations of law had not been offered in the trial court.

Funds were deposited in the defendant bank in the name of a federal disbursing agent under regulations of Treasury Department providing that, "Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom payment is to be made, and payable to 'order' * * *" The disbursing officer fraudulently drew checks payable to fictitious payees and cashed them under forged indorsements of the fictitious payees' names. *Held,* that such checks

were not payable to bearer and that the bank was not protected in paying them, distinguishing Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, on the ground that there is a distinction to be drawn between the case of the government and of a private party as drawer. National Bank of Commerce v. United States, 224 Fed. 679, 140 C. C. A. 219. *Sed quaere* as to the validity of this distinction? The person who drew the checks intended to make them payable to fictitious payees and that made them payable to bearer under the act. The question therefore was whether the United States was bound by the statute of the state where the checks were drawn and negotiated and where the Negotiable Instruments Law was in force? That it is so bound, see Smith v. Nelson Land & Cattle Co., 212 Fed. Rep. 56, 128 C. C. A. 512.

Another ground stated by the court is possibly more tenable, *viz.*, that the bank as a depository of public money must be taken to have knowledge of and to be subject to the regulation in question, and that the regulation must be interpreted so as to forbid the payment of checks payable to bearer, whether so expressed or treated as such, because payable to fictitious payees, see United States v. Chase Nat. Bank, 241 Fed. 535, 537, S. C. sec. 62.

An instrument knowingly made payable to the order of a fictitious or non-existing person is negotiable without indorsement, but to recover upon the instrument as payable to bearer, it must be shown that the maker had knowledge of the fiction, and if the plaintiff declares only upon the instrument as payable to order, it is not necessary to decide whether there is evidence of such knowledge, as the issue is not open. Boles v. Harding, 201 Mass. 103, 87 N. E. 481. This case is meagerly reported, but it seems to hold that the plaintiff, having declared that the instrument was indorsed by the payee, must prove it or fail, which is a harsh rule, as he may not be aware of the fictitious character of the payee before the trial.

The complaint and the answer both alleging that the payee, J C was a fictitious person and had no interest in the note, and the answer not averring that defendant did not know that J C was a fictitious person, and the trial court having found that the note was executed and delivered to plaintiff by the makers, of whom defendant was one, that the plaintiff paid value and that J C, whose name appeared as payee, was a fictitious person, that the note was never delivered to him and that he had no interest in it, it may reasonably be inferred after verdict and judgment for the plaintiff that the defendant and the other makers knew that J C was a fictitious person and the real payee. Weishaas v. Pendeton, 73 Ore. 190, 144 Pac. 401.

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In reading the following English cases it must be remembered that the Bills of Exchange Act treats an instrument, payable to a fictitious or non-existing person, as payable to bearer, without regard to the knowledge of the person making it so payable. See *supra*, p. 31, n. 2.

A bill payable to a real person not intended by the drawer to have any interest in it is payable to a fictitious person, and is to be treated as payable to bearer, and the acceptor's ignorance of the fiction is immaterial. Bank of England v. Vagliano [1891], A. C. 107.

The drawer's ignorance that the payee is non-existing is also immaterial. Clutton v. Attenborough [1897], A. C. 90. But if the payee is a real person intended by the drawer to be the payee, he is not a fictitious person, and the drawer is not liable to one claiming under a forged indorsement of the payee's name, although the payee really had no interest in the instrument. Bank of England v. Vagliano and Clutton v. Attenborough, distinguished. Vinden v. Hughes [1905], 1 K. B. 795; North & South Wales Bank v. Macbeth [1908], A. C. 137.

London Life Co. v. Molsons Bank [1904], 8 Ontario L. R. 238 (criticised in 43 Canadian L. Rev. 225); City Bank v. Rowan, 14 So. Wales Rep. (Law) 127 (criticised in 10 Law Quarterly Rev. 40), *contra*. Both these *contra* cases were decided before Vinden v. Hughes and North & South Wales Bank v. Macbeth.

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On the strength of what subsequently proved to be a forged promissory note, the plaintiffs sent by post a crossed cheque,[1] drawn by them in favor of M or order, for the amount of an advance. P intercepted the cheque and brought it to the D branch of the defendant bank, and, having indorsed it first as M and next as P, received payment of the amount of the cheque.

In an action by the plaintiffs against the defendant bank to recover the amount of the check as money had and received by them to and for the use of the plaintiff. *Held*, that the payee was not "a fictitious or non-existing person" within the meaning of section 7, subsection 3, of the Bills of Exchange Act, 1882;[2] that therefore the cheque could not be treated as payable to bearer; and that the plaintiffs were entitled to judgment. Vinden v. Hughes [1905], 1 K. B. 795, and North & South Wales Bank, Ld., v. Macbeth [1908], 1 K. B. 13, [1908] A. C. 137 followed and applied. Town, etc., Co. v. Provincial Bk. of Ireland [1917], 2 I. R. 421.

The cases of fictitious or non-existing payee and the cases of fraudulent impersonation often run into each other and therefore cases cited under section 23, *infra*, should also be considered. Cases under section 62 should also be consulted, since the signature of the drawers of instruments with fictitious or non-existing payees are often forged.

(*b*) In an action against the drawer of a check payable to order of cash, the production of the check is *prima facie* evidence of ownership. Cleary v. DeBeck Co., 54 Misc. Rep. 537, 104 N. Y. Supp. 831.

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1 *Infra*, pp. 557 *et seq.*

2 *Supra*, p. 31, n. 2.

Under section 9-4, an instrument payable "to the estate" of a deceased person is payable to bearer and requires no indorsement. *In re* Ziegenheim (Mo. App.), 187 S. W. 893, S. C. sec. 65. *Sed quaere?* The payee meant was, of course, the executor or administrator of the estate. Shaw v. Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348; Peltier v. Babillion, 45 Mich. 384, 8 N. W. 99; McKinney v. Harter, 7 Blackford, 385; Lewisohn v. Kent Co., 87 Hun, 257, *contra,* and the words used should be held to be a *descriptio personae* of the representative of the estate, although a literal reading of section 9-4 might lead to the result reached by the court. This case illustrates the difficulty of covering by general language such cases as instruments payable to "cash," to "sundries," "bills payable," etc. Probably the only way to cover such cases without including such cases as the principal case, in which the instrument was certainly not intended to be payable to bearer, would be to provide that "when an instrument is made payable to "cash," "to bills payable," "to bills receivable," "to sundries," or the like, the instrument is payable "to bearer."

(*c*) AMES: The language of subsection 5 is not well chosen. 1. Taken literally, a note payable to the order of B and bearing the anomalous blank indorsement of C, would be payable to bearer, which is, of course, an absurdity. 2. It means that an instrument expressly payable to bearer so continues, although afterward specially indorsed; but that if an instrument payable to order has become payable to bearer by being indorsed in blank, it ceases to be payable to bearer, if afterwards indorsed specially, an illogical and undesirable distinction. 3. If an instrument, indorsed in blank, and subsequently indorsed specially, is transferred by the special indorsee by delivery merely, the transferee can sue prior parties only in the name of his assignor. But as owner, though not according to this subsection, holder, he ought to have the right to strike out the special indorsement and sue as bearer.

But it should be provided that, though payable to bearer, a subsequent special indorsement carries notice that the property in the instrument was once vested in the special indorsee, so that, in the absence of an indorsement or assignment by him, all subsequent holders will hold for his benefit.

BREWSTER: Professor Ames' first objection is untenable; his construction is impossible. As to his third objection, section 40 gives the transferee the right to sue in his own name. And section 48 gives the right to strike out any indorsements not necessary to title.

MCKEEHAN: Professor Ames' second objection is not tenable. The distinction noted is logical and in accordance with the mercan-

tile view. As to his third objection, the transferee, by delivery from the special indorsee of an instrument payable to order and indorsed in blank, should not have the right to strike out indorsements necessary to his title. Under Smith v. Clarke, 2 Peake, 225, the holder had the right to strike out all indorsements after the first blank indorsement. But section 9-5 was adopted expressly to do away with this doctrine. Section 48 gives the right to strike out only indorsements not necessary to the holder's title, and in the case put, the indorsement to the special indorsee is necessary to his title, and therefore can not be stricken out. As to Judge Brewster's statement, that section 40 gives the transferee by delivery from the special indorsee the right to sue in his own name, if this is so, then Smith v. Clarke is still in force, and section 9-5, which was inserted to overthrow that case, is a nullity. See *infra,* under section 40, for further discussion.

Bledsoe v. City Nat. Bank, 180 Ala. 586, 60 So. 942, S. C. sec. 3; Ohio Valley, etc., Co. v. Great Southern Fire Ins. Co. (Ky.), 197 S. W. 399, S. C. sec. 47.

A promissory note indorsed in blank by the payee is payable to bearer. Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959, S. C. secs. 16, 56, 124, 191; Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655 (a check), S. C. sec. 56.

A note payable to the maker's order and by him indorsed in blank, is payable to bearer, and thereafter negotiable by delivery. Davis v. First Nat. Bank of Blakeley, 192 Ala. 8, 68 So. 261, S. C. sec. 30; People's Nat. Bank v. Taylor, 17 Ariz. 215, 149 Pac. 763.

The indorsement in blank of a non-negotiable promissory note does not make it negotiable, and the indorser is liable only as an assignor. Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N.S.) 804, S. C. sec. 1-4; Johnson v. Lassiter, 155 N. C. 50, 71 S. E. 23; Newland v. Moore, 173 N. C. 728, 92 S. E. 367.

Sec. 10. Terms When Sufficient.

The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.[1]

Alabama, Idaho, Iowa, North Carolina and Wyoming Acts insert the word "negotiable" between the words "The" and "instrument."

[1] Not in B. E. A.

The Wisconsin Act (No. 1675-10) adds "Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of delivery, are part of the instrument and parol evidence is admissible to show the circumstances under which they were made."

A certificate of deposit reciting that "X has deposited in the Y bank three thousand dollars to the credit of himself, payable in current funds on return of this certificate properly indorsed on July 1, 1909," is a negotiable instrument under the N. I. L. Forest v. Safety Banking & Trust Co. (E. D. Pa.), 174 Fed. 345.

A note, not payable to order or to bearer or other words clearly indicating an intention to make it negotiable, is not negotiable, although the note contained certain provisions respecting the mortgagee or his "assigns," since these related to the mortgage securing the note and indicated only that the mortgage might be transferred by indorsement. Quest v. Ruggles, 72 Wash. 609, 131 Pac. 202.

Sec. 11. Date, Presumption As To.

Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

The burden is on the defendant to establish the defense of forgery by alteration of date by clear, cogent and convincing evidence. National City Bank v. Shelton Electric Co., 96 Wash. 74, 164 Pac. 933, S. C. sec. 56.

Testimony impeaching a witness who attested the correctness of the date merely destroys such witness' testimony, but does not affect the *prima facie* correctness of the date mentioned in the instrument. *Ib.*

Sec. 12. Ante-Dated and Post-Dated.

The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose.[1](*a*) The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.[2]

[1] "A bill is not invalid by reason only that it is antedated or postdated, or that it bears date on a Sunday." B. E. A. s. 13 (2).

[2] Not in B. E. A.

The Missouri Act by an evident clerical error reads "valid" instead of "invalid."

(*a*) This section seems to contemplate instruments ante-dated or post-dated by the parties in accordance with a mutual agreement to that effect. Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756, S. C. sec. 13.

A check otherwise negotiable in form is none the less negotiable because post-dated. And an indorsee is not put upon inquiry merely because the check is negotiated prior to the date of its date. Trephonoff v. Sweeny, 65 Ore. 209, 130 Pac. 979; Albert v. Hoffman, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043, sec. 25.

A post-dated check is a legal and proper instrument and is payable immediately on its date, and is so far payment of a debt until dishonored that, after its delivery, the drawer can not be garnished as the payee's debtor. American Agricultural Chemical Co. v. Scrimger, 130 Md. 389, 100 Atl. 774.

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A post-dated check is not invalid, and may be properly stamped as a bill payable on demand. Royal Bank v. Tottenham [1894], 2 Q. B. 715; Hitchcock v. Edwards, 60 L. T. Rep. 636.

Nor is a post-dated check irregular, within section 29(1) of the Bills of Exchange Act (section 52-1, N. I. L.), so as to charge the holder with equities. Hitchcock v. Edwards, 60 L. T. Rep. 636.

Sec. 13. When Date May Be Inserted.

Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly.(*a*) The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.[1]

(*a*) Holman v. Higgins, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916F, 1263, S. C. 125.

[1] "Provided that (1) where the holder in good faith and by mistake inserts a wrong date and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date." B. E. A. s. 12, second paragraph.

Plaintiff purchased from the payee an undated note payable four months after date, on which were the indorsements of the payee and of several other accommodation indorsers. Plaintiff knew the date of issue of the note, but without authority filled in a later date. *Held,* that section 13 implies, at least, that the insertion of a wrong date in an undated instrument, by one having knowledge of the true date of issue, will avoid the instrument as to him, and that the indorsers were discharged. Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756, S. C. sec. 12.

Sec. 14. Blanks—When May Be Filled.

Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein(*a*) And a signature on a blank[1] paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount.[2] In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time.(*b*) But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.(*c*)

The Illinois Act interpolates the words "issued or" before "negotiated" in the last sentence.

The Wisconsin Act inserts "prior to negotiation" before the words "by filling."

The Wisconsin Act also omits the words "*prima facie*" in the seventh line of the section.

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[1] The English Act interpolates the word "stamped." B. E. A. s. 20 (1).

[2] B. E. A. s. 20 (1) provides that the blank signature shall operate as *prima facie* authority to fill up "for any amount the stamp will cover, using the signature for that of the drawer, acceptor, or an indorser."

The Kentucky Act uses "negotiable" in the last paragraph instead of "negotiated," an evident clerical error.

The South Dakota Act substitutes for this section the following: "One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form."

(*a*) Perry v. Pye, 215 Mass. 403, 102 N. E. 653; Phillips v. Hensley (N. C.), 94 S. E. 673; Holman v. Higgins, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916F, 1263, S. C. sec. 125.

The authority under this section extends to every incomplete feature of the instrument, and may be utilized for the insertion of the date, the amount, the name of the payee and the time and place of payment. Linthicum v. Bagby, 131 Md. 644, 102 Atl. 997, S. C. sec. 109.

The word "material" in this section is not synonymous with "necessary" so as to restrict the right of filling a blank to something essential to a complete negotiable instrument. Therefore the name of a place may be written after delivery in a blank space after the word "at" and the instrument will not be thereby avoided in the hands of a holder in due course. Johnston v. Hoover, 139 Iowa, 143, 117 N. W. 277.

A note was delivered to the plaintiff bank by the maker with a blank before the words "after date" with authority to the cashier of the bank to fill the blank, which he did nearly four months later with the words "four months." *Held*, that this was not a material alteration invalidating the note as against the bank. Howard National Bank v. Arbuckle (Vt.), 102 Atl. 477.

But where a note was delivered by the maker to the plaintiff with the blank before the words "after date" with no authority to fill the blank, this would probably be deemed a demand note, and filling the blank with the words "making the note payable at a fixed time" was a material alteration avoiding the instrument. Bloom v. Horwitz, 100 Misc. Rep. 687, 166 N. Y. Supp. 786.

One who takes a note payable "on or before four ——— after date," with the blank unfilled, is not a holder in due course. Such a note is not payable on demand. *In re* Estate of Philpott, 169 Iowa, 555, 151 N. W. 825, S. C. secs. 52, 53.

Defendant signed a note as maker for the accommodation of A. It was intended to make the note payable to A, but by an oversight the space for the name of the payee was left blank and in that condition A indorsed the note for value to plaintiff. On a petition by plaintiff for a reformation of the note by inserting the name of the payee and for judgment thereon. *Held*, that al-

though more than a reasonable time had elapsed after the delivery of the note to A, the note should be reformed, and there being no equities against it, judgment should be entered thereon against defendant. Farmers Loan & Trust Co. v. Brown (Iowa), 165 N. W. 70.

Where the maker of a note signed and delivered it, leaving a blank after the amount between the words "at" and "value received," the payee or any subsequent holder was authorized to fill the blank with a place of payment either within or without the state, and such act was not an alteration avoiding the note. Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643.

Where a note is drawn payable with interest at the rate of —— per cent., it draws interest at the legal rate, although the blank is not filled. Hornstein v. Cifuno, 86 Neb. 103, 125 N. W. 136. The N. I. L. was not cited in this case.

And the insertion of the legal rate in the blank does not change the effect and the alteration is immaterial. Crawford v. Simonton, 163 Ala. 609, 50 So. 1024.

But the insertion in the blank of a rate of interest greater than the legal rate is a material alteration and will avoid the instrument. Ayers v. Walker, 54 Colo. 571, 131 Pac. 384.

(*b*) Rodgers v. Baker, 136 App. Div. 851, 122 N. Y. Supp. 91; Banque Franco-Americaine v. Bergstrom, 157 N. Y. Supp. 635.

In Business Men's League v. Sregow, 153 N. Y. Supp. 231, a note, blank as to date, due date and payee, was signed by the defendants, the maker and two indorsers, without consideration, and delivered to R for his accommodation. R pledged it to plaintiff as collateral for a loan of $500. The note was excluded from evidence apparently on the ground that when it was delivered to R it was not filled in and there was no evidence either way as to authority to fill it in. *Held*, error. The court made no reference to the Negotiable Instruments Law, but held on the authority of old New York cases that the delivery of the note in blank gave implied authority to fill in and negotiate it, and the fact that it is filled in, in the presence of the purchaser, does not put him on inquiry as to the terms of the authority. The court seemed to be unaware that the old rule had been changed by section 14, N. I. L.

The case, however, suggests interesting questions as to the burden of proof. First, is the mere delivery of the instrument signed in blank *prima facie* evidence that it was delivered in order that the paper may be converted into a negotiable instrument? It would probably be so held because of the form of the instrument, but see Smith v. Prosser [1907], 2 K. B. 735, *infra*, p. 56. Second, the delivery for the purpose mentioned operates as a *prima facie*

authority to fill up the instrument as such (that is, as a negotiable instrument), for any amount. Does this include a *prima facie* authority to fill in other blanks? Probably as to all missing requirements necessary to make it a negotiable instrument, since otherwise it would not be such an instrument.

In Bloom v. Horwitz, 100 Misc. Rep. 687, 166 N. Y. Supp. 786, it was held that the *prima facie* authority to fill in blanks in an incomplete note may be rebutted by affirmative proof which the maker has the burden of presenting.

But the burden is on the plaintiff, a party prior to the completion of an instrument signed in blank, to prove that the blanks were filled up within a reasonable time. *Semble*, that from October to the following June 9 is, if unexplained, more than a reasonable time. Madden v. Gaston, 137 App. Div. 294, 121 N. Y. Supp. 951, S. C. sec. 16.

For the payee or one in privity with him to enforce a note executed in blank, against anyone a party thereto, before its completion, the evidence must show it was filled up in accordance with the authority given. Testimony of the maker that he gave no one authority to fill a blank will overcome any presumption of authority arising from the fact that it was delivered in blank. Equitable Trust Co. of New York v. Lyons, 72 Misc. Rep. 49, 129 N. Y. Supp. 79.

The presumption that a note was completed before it was signed and not afterwards, does not arise where the note is written in several inks and different hands. Exchange Bank v. Robinson, 185 Mo. App. 582, 172 S. W. 628.

In Dumbrow v. Geld, 72 Misc. Rep. 400, 130 N. Y. Supp. 182, the defendant indorser signed a printed form which the maker afterward filled up and signed, adding a provision as to interest, although the printed form contained no provision therefor. It was *held*, that, as the plaintiff transferee knew that the note had been indorsed before it was filled in and signed by the maker, he was not a *bona fide* holder. The facts are not very fully reported, but the case seems to hold that a transferee can not be a holder in due course if he knew that the instrument had been signed in blank or in an incomplete state, although it had been filled up and was complete at the time he took it. Knowledge on the part of a purchaser that the instrument was incomplete when signed, but completed before the transfer, seems to be given as much effect to put him upon inquiry as if he had seen the instrument or taken it in an incomplete state. But the language of section 52 seems *contra*, since "a holder in due course is a holder who has *taken* the instrument under the conditions (among others) that it *is* complete and regular upon its face."

Defendant signed a note in blank on the statement that it was to be used to borrow money for a co-defendant who was jointly liable with the plaintiff to a bank. The note was filled up in the presence of the plaintiffs, who were made payees, and delivered to them, and they then paid the co-defendant's share of the debt

to the bank. *Held,* that the note was filled up in accordance with the authority given, that the payees were holders for value and could recover on the note. Hermann's Exr. v. Gregory, 131 Ky. 819, 115 S. W. 809, S. C. sec. 25.

A note signed by defendant contained a power of attorney for confession of judgment for the amount of the note, and costs, and attorney's fees, the space for the amount of attorney's fees being left blank. Upon entering a confessed judgment the payee's attorney wrote in the blank space a sum equal to ten per cent. of the amount of the note. The judgment was vacated on motion, and at the trial the evidence showed that at the time of delivery the parties contemplated the insertion of such amount as might be necessary. *Held,* that the note was not void for alteration and was properly admitted in evidence. Kramer v. Schnitzer, 268 Ill. 603, 109 N. E. 695, S. C. sec. 52.

(*c*) Stanley v. Davis, 32 Ky. Law R. 1135, 107 S. W. 773; First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4; Stone v. Sargent, 220 Mass. 445, 107 N. E. 1014, S. C. sec. 124.

The purchaser of a negotiable instrument with an unfilled blank is put upon inquiry as to the authority of the person intrusted with the incomplete instrument. Section 14, N. I. L., changes the law. Guerrant v. Guerrant, 7 Va. L. Reg. 639 (payee); Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426 (amount), S. C. sec. 52; Hartington Nat. Bank v. Breslin, 88 Neb. 47, 128 N. W. 659, 31 L. R. A. (N. S.) 130, Ann. Cas. 1912B, 1008 (payee); Tower v. Stanley, 220 Mass. 429, 107 N. E. 1010 (payee), S. C. secs. 8, 124; Munroe v. Stanley, 220 Mass. 438, 107 N. E. 1012, S. C. sec. 124; Stone v. Sargent, 220 Mass. 445, 107 N. E. 1014 (payee), S. C. sec. 124; Union Trust Co. v. McCrum, 145 App. Div. 409, 129 N. Y. Supp. 1078, affirmed without opinion, 207 N. Y. 721, S. C. sec. 120-6.

Defendant indorsed a note with the name of X inserted as payee, but otherwise blank, and gave the same to X to use in renewal of another note which defendant had indorsed for the accommodation of X. The affidavit of defense, in addition to the above facts, stated that X never indorsed the note, but that a partner of X filled up the note, signed the name of the firm as makers, indorsed the name of X and the firm name on the note, and negotiated it to a bank, which placed the proceeds to the credit of the firm. *Held,* that the indorsement of the firm name was an affirmation that the indorsement of X's name was by him or by his authority, that X was estopped thereby as well as by the receipt of the proceeds to deny the genuineness of his signature. Richards v. Street, 31 App. Cas. D. C. 427, S. C. sec. 26.

Sed quaere? If X had in fact indorsed the note or authorized the indorsement in his name, and after its completion it had been used for another purpose than intended by defendant, the defendant would nevertheless be bound to a holder in due course. But any estoppel against the firm as makers or as indorsers from having negotiated the note with the apparent indorsement of the payee, should not be available against third parties. The firm and each of its partners may be estopped to deny that the title passed, but the defendant has the right to insist that the title could pass, as far as he is concerned, only by the indorsement of the payee named in the note before the defendant indorsed and delivered the blank form. Horstman v. Henshaw, 11 How. 177, cited by the court, does not cover such a case. If, in that case, the drawer after delivering the bill to the payee had come into wrongful possession of the bill, had forged the name of the payee and negotiated the bill and the drawee had accepted the bill and had been sued on the acceptance, while the drawer would be estopped, if he had been sued, to set up the forgery of the payee's name, the acceptor, surely, would not be estopped to show that plaintiff had no title, for the acceptor would still be liable to the payee.

Under section 23, N. I. L., a "signature forged or made without authority is wholly inoperative, and no right to enforce payment against any party can be acquired through or under such signature except as against parties who are precluded from setting up the forgery or want of authority." Therefore, the firm and partners might be precluded, but this would not preclude other parties. Defendant's promise was to pay only on the order of X which was not given. Even if the plaintiff could be regarded as an assignee of the payee, he would be subject to the defendant's equity against the payee. Seymour v. Leyman, 10 Ohio St. 283, *infra,* sec. 49.

Defendant signed a note in blank and gave it to A with the authority to fill it up not in excess of $200. A filled it up for $2,000 payable to plaintiff, and delivered it to him in payment of a debt. *Held,* that defendant was not liable to plaintiff on the note, although plaintiff was ignorant of A's abuse of his authority. Plaintiff was a holder, but not a holder in due course to whom the instrument had been "negotiated." Herdman v. Wheeler [1902], 1 K. B. 361, *infra,* p. 53, followed, Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N.S.) 490.

As to this case, Professor Hening remarks,[1] that "the Iowa decision assumes a pathetic aspect" in view of the fact that the English case,[2] which it followed, has been practically overruled by the later English case of Lloyd's Bank v. Cooke.[3]

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[1] Hening, The Uniform Negotiable Instruments Law, 59 U. of P. Law Rev. 471, 479.

[2] Herdman v. Wheeler.

[3] [1907], 1 K. B. 794.

Although not necessary for the decision in the case, the Supreme Court of Iowa, in the later case of Devoy & Kuhn Coal Co. v. Huttig, 174 Iowa, 357, 156 N. W. 413, S. C. secs. 125, 192, said that it was not inclined to depart from the ruling of Vander Ploeg v. Van Zuuk, and cited Builders' Lime & Cement Co. v. Weimer, 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174, S. C. secs. 58, 125. In this latter case the court held that the plaintiff was not a holder in due course because the note first passed from one of the makers to the plaintiff, and the court cited and quoted from Vander Ploeg v. Van Zuuk in support of its position. But upon the facts, the question whether a payee could be a holder in due course was not involved.

The defendant signed the note as surety to enable his co-maker to buy lumber of the payee to complete certain contracts. The note when signed by the defendant was payable to the order of a named payee. The principal maker subsequently obliterated the words "order of" in the note, and inserted after the name of the payee the words "or bearer," and used the note to pay a debt to the plaintiff, who was not the payee named. Under these circumstances it is evident that the note was avoided as to defendant by the fraudulent alteration after he signed it, and further, that the note never having been delivered to or indorsed by the named payee, the plaintiff got no title and did not become a holder at all, and of course could not be a holder in due course, and therefore it was unnecessary to discuss that question.

In Miller v. Campbell, 173 App. Div. 821, 160 N. Y. Supp. 834, the court cited Vander Ploeg v. Van Zuuk, and said that while the citation in that case from Lewis v. Clay was probably *dictum*, "the opinion clearly indicated that the persons for whose protection immunity is given to negotiable instruments, are those who have negotiated the purchase of the paper after its inception." But the court went on to say, "It may be that the payee named in a note is so separated from the consideration of the note that he may still have the rights of a purchaser for value of commercial paper. On the other hand, a transferee may be so associated with the consideration and the transaction in which the note was given as not to be within the intended protection of the Negotiable Instruments Law."

In accord with the Iowa court are Long v. Shafer, 185 Mo. App. 641, 171 S. W. 69, where it was assumed, without discussion, that the transfer of a note by the maker to the payee is not a negotiation within sections 30 and 52, and that therefore a payee can not be a holder in due course. Southern Nat. Life, etc., Co. v. People's Bank (Ky.), 198 S. W. 543, S. C. sec. 119, where it was held, without discussion, upon the authority of the Iowa cases, and citing no other American or English cases, that under section 30 a note is issued to the payee but not negotiated. Bowles v. Frazer, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N. S.) 613, making no reference to the N. I. L. and citing no cases.[1] Hathaway Co.

[1] See criticism of this case in 59 U. of P. Law Rev. 481, 508.

v. County of Delaware, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909.[1] In the last two cases the provisions of the Negotiable Instruments Law are not cited and they are therefore not of value upon the question as affected by the act. Two questions are involved in the foregoing cases. First, whether under the act the common-law rule that a payee may be a holder in due course still prevails. Second, whether delivery to the payee is a negotiation, although the instrument was incomplete when signed and delivered to a third person with authority to fill up and is completed before the delivery to the payee. These questions are of great importance. If a payee can not be a holder in due course, the universal mercantile custom and the overwhelming weight of authority[2] have been upset by the act and the *bona fide* payee of a bill of exchange remitted to him by a buyer of goods can not recover against the drawer if the remitter has procured the bill from the drawer by fraud. But no such construction of the act is warranted. The first English case after adoption of the Bills of Exchange Act was Lewis v. Clay, 67 L. J. Q. B. (N. S.) 224, in which Lord Russell said that a payee can not be a holder in due course under section 29 of the Bills of Exchange Act (section 52, N. I. L.). But this was *obiter* and was dissented from in Herdman v. Wheeler [1902], 1 K. B. 361, 372, and the cases at common law do not seem to have been considered.

In Lloyds Bank v. Cooke [1907], 1 K. B. 794, the defendant signed a note as maker with authority to another to fill it up with a certain sum payable to plaintiff, and it was filled up for a larger sum and delivered to plaintiff who had no notice of the fraud. It was held that, independently of section 20(2), (section 14, N. I. L.), defendant was estopped to deny the validity of the note as against the plaintiff. Although the court attempted to distin-

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[1] This case was really decided upon the theory that the payee was put upon inquiry of the rights of the drawer. It is submitted that it was wrong upon its facts, but that at any rate it does not decide that a payee may not be a holder in due course and it makes no reference to the N. I. L. The case is disapproved in 23 Banking Law Journal 595.

[2] Watson v. Russell, 3 B. & S. 34, approved in Railroad Co. v. Nat. Bank, 102 U. S. 14; Munroe v. Bordier, 8 C. B. 862, approved in Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 143, 66 N. E. 646, 97 Am. St. Rep. 426, S. C. sec. 14; Poirier v. Morris, 2 E. & B. 89, S. C. 1, Weekly Rep. 349; Cagle v. Lane, 49 Ark. 465; Lucas v. Owens, 113 Ind. 521; Mitchell v. Donahey, 62 Ia. 376, *semble*; Steadwell v. Morris, 61 Ga. 97; So. Boston Iron Co. v. Brown, 63 Me. 139; Fairbanks v. Snow, 145 Mass. 153; Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 143; Ford v. Shapiro, 207 Mass. 108; Adams v. Power, 48 Miss. 450; Brown v. Weldon, 27 Mo. App. 251; Horn v. Fuller, 6 N. H. 511; Railroad v. Chamberlin, 44 N. H. 494; Vass v. Riddick, 89 N. C. 6; Armstrong v. Am. Exch. Bank, 133 U. S. 433, 453. Against this great array of authority only following cases have been found; three cases in Nebraska, Vorce v. Rosenbery, 12 Neb. 448; Chariton Plow Co. v. Davidson, 16 Neb. 374; Camp v. Sturdevant, 16 Neb. 693; all poorly considered cases, citing none of the authority to the contrary.

guish Herdman v. Wheeler on the ground that the question of estoppel was not there discussed, yet Fletcher-Moulton, L. J., considered fully both of our questions and decided both in the affirmative.

In Canada [1] and New Zealand [2] also, it has been held under the same provisions in the Bills of Exchange Acts of those countries, that a payee may be a holder in due course.

In Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, a woman delivered to her husband a check made payable to her creditor with instructions to pay her debt with it. The husband gave the check to the creditor as a payment of a debt of his own to the same creditor, who accepted it as such in good faith. It was held that the payee was a holder in due course, without regard to the question whether the check had been "negotiated" within sec. 14 N. I. L.

This case was followed by Thorpe v. White, 188 Mass. 333, 74 N. E. 592, S. C. secs. 61-4, 124, in which the defendant signed her name in blank, on a promissory note of which one White was maker and plaintiff the payee. The maker wrote in the body, without the consent of defendant, the words, "With the privilege of renewal for one year, etc.," and delivered it to the plaintiff for value. It was held that under the act, plaintiff was a holder in due course, and could recover from the defendant as indorser.

These cases were cited approvingly in Lowell v. Bickford, 201 Mass. 543, 545, 88 N. E. 1, in J. G. Brill & Co. v. Norton, etc., Railway, 189 Mass. 431, 437, 75 N. E. 1090, in Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B, 144, *infra*, p. 54, and in Colonial Fur Co. v. First Nat. Bank, 227 Mass. 12, 116 N. E. 731. In the last case it was held that a bank, which before maturity in good faith and without notice of infirmity or defect in the title, received in payment of a note held for collection, the check of a third person, became a holder in due course, although the check was drawn payable to the bank.

In National Investment Co. v. Corey, 222 Mass. 453, 111 N. E. 357, it was held that the payee of a check who received it from a third person in payment of a pre-existing debt, without notice of any infirmity, was a holder in due course, and that the check having been collected from the drawee bank, the drawer could not recover the proceeds from the payee on the ground that the check was drawn by its treasurer without authority.

In Potts v. First State Bank (Okla.), 151 Pac. 859, it was held that a surety who was induced to sign a promissory note by fraud of the principal maker is liable to the innocent payee who paid value to the principal maker.

In *Ex parte* Goldberg v. Lewis, 191 Ala. 356, 67 So. 839, L. R. A. 1915F, 1157, the question whether under the Negotiable In-

[1] Lilly v. Farrar, [1908], Quebec Rep. 17, K. B. 794, 806, 807; McDonough v. Cooke [1909], 19 Ontario L. Rep. 267, 271, 273; Knechtel Furniture Co. v. Ideal House Furnishers [1910], 19 Manitoba Rep. 652.

[2] Grant v. Harty, 6 New Zealand Law Rep. 44.

struments Law a payee can be a holder in due course was fully discussed and decided in the affirmative after a thorough examination and review of all the cases, English, Canadian and American. In this case a surety, who signed the note in reliance on the maker's false statement of genuineness of the signature of another surety, and on a violated condition that others should also sign as sureties, was held liable to the payee, who took in good faith for value and without notice.

In Brown v. Brown, 91 Misc. Rep. 220, 154 N. Y. Supp. 1098, *sub nomine,* Brown v. Rowan, S. C. sec. 52, it was held, citing the Massachusetts cases, *supra,* that a payee of a promissory note may be a holder in due course under sections 52 and 25, N. I. L.

Again, in Bergstrom v. Ritz-Carlton Co., 171 App. Div. 776, 154 N. Y. Supp. 959, a hotel company without notice that the instrument was a forgery, cashed a check purporting to be signed by the wife of its customer, and payable to the order of the hotel company, and collected the same from the drawee bank and was sued by the apparent drawer to recover the money. It was contended "that defendant being party to the check itself and it becoming a commercial paper only after the defendant had indorsed it and put it in circulation, defendant could not stand in a position of a purchaser of commercial paper in due course." The court held, citing the Massachusetts cases, *supra,* that a payee may be a holder in due course under section 52 of the N. I. L., and that therefore the plaintiff could not recover.

In Figures v. Fly, 137 Tenn. 358, 378, 193 S. W. 117, S. C. secs. 62, 66, the court, citing Liberty Trust Co. v. Tilton, 217 Mass. 462, *infra,* p. 54, among other cases, held that a party "did not fail to attain the status of a holder for value because it was the payee named in the check and not the indorsee on purchase or discount." In the recent case of Johnston v. Knipe (Pa.), 105 Atl. 705, the court approved the case of Liberty Trust Co. v. Tilton, *supra,* p. 54, and refused to follow the Iowa case, *supra,* p. 49.

Second, is delivery to the payee of an instrument signed in an incomplete state and subsequently completed before such delivery a negotiation? In Herdman v. Wheeler [1902], 1 K. B. 361, it was held that it was not within section 20(2) of the Bills of Exchange Act (section 14, N. I. L.)[1]. But the correctness of this holding was denied by Fletcher Moulton, L. J., in Lloyds Bank v. Cook [1907], 1 K. B. 794, in an opinion, the reasoning of which seem unanswerable.

Section 191 defines "holder" as "the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Section 52 defines a holder in due course as "a holder who has taken the instrument under the following conditions: 1. That it is complete and regular on its face. 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated

[1] See criticism of this case in 15 Harvard Law Rev. 579.

to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Since "holder," as defined in section 191, includes a payee who is in possession, the word holder in the first clause of section 52 and in the second subsection may be replaced by the definition in section 191 so as to read "a holder in due course is a payee or indorsee who is in possession," etc.

Now as to subsection 4. Was the instrument negotiated to this holder who is a payee in possession? Is "negotiation" limited to transfer by indorsement? By section 30 "an instrument is negotiated when it is transferred from one *person* to another in such manner as to constitute the transferee the holder thereof." It is not prescribed in this section that the transferor shall be a holder but only a "person." It is only necessary to transfer the instrument so as to constitute the transferee a holder. As a "payee who is in possession" is by section 191 a holder, it is clear that a maker or drawer, for instance, or a person intrusted with the instrument though not himself a holder, negotiates it when he transfers it to the payee.

The last paragraph of section 30, "if payable to order it is negotiated by the indorsement of the holder completed by delivery," must be construed to refer to negotiation after the instrument has come into the hands of the payee or other holder (indorsee). Reading the definition of "holder" in section 191 into the paragraph it will read, "if payable to order it is negotiated by the indorsement of the 'payee' or indorsee who is in possession."

The Supreme Court of Massachusetts, in Liberty Trust Co. v. Tilton, 217 Mass. 462, 465, 105 N. E. 605, L. R. A. 1915B, 144, speaking of this paragraph of section 30, said that "it was not intended to include all the ways in which an instrument might be negotiated nor to restrict the comprehensive terms of the preceding sentence. Plainly, under these two sections (30 and 191), a negotiable instrument payable to a named payee is negotiated when the physical possession of it is handed for value to the person named as payee. One effect of the last sentence of section 30 is to describe the method by which the person who first becomes holder may pass it. It does not comprehend all the ways by which an instrument may be negotiated."

In this case X signed a note to the order of plaintiff, complete except as to amount, and defendant indorsed it in blank for the accommodation of X upon the agreement that defendant's signature should not be operative or the note delivered unless Y should also indorse, and then it should be filled out for $200 only. Y did not sign, the amount of $400 was filled in, and X without authority, delivered the note to plaintiff, who paid value, *bona fide*, and without notice of the said agreement, and it was held that plaintiff, though payee, was a holder in due course, to whom the note had been negotiated and that he could hold the defendant. The court cited and declined to follow the Iowa case of Vander Ploeg v. Van Zuuk, *supra*.

In Johnson v. Knipe (Pa.), 103 Atl. 957, the Supreme Court of Pennsylvania held that a payee may be a holder in due course to whom an instrument is negotiated under section 30. The court followed the Massachusetts case of Liberty Trust Co. v. Tilton, *supra*, and refused to follow the Iowa cases.

It is submitted that the Iowa court erred in holding that a negotiation can only be made by one who is already a "holder," since section 30 does not use that word in defining a negotiation but uses the word "person.' Yet the court in Vander Ploeg v. Van Zunk, *supra*, inconsistently says (p. 355), that "if A, purchasing a draft to be transmitted to B, in payment of A's debt to B, causes the draft to be drawn payable to B, no doubt A is the holder of such draft, and B taking it for value becomes a holder in due course. This was true before the passage of the Negotiable Instruments Act. There is no reason to think the situation of the parties to such a transaction is different under the act. No doubt the payee named in a promissory note might under similar circumstances be a holder in due course." The court erred in speaking of A in the case put as a "holder," for he was neither payee or indorsee, although he was in possession of the draft, but as he was a "person" who transferred the instrument to B in such a manner as to constitute B the holder, this was a negotiation. The court attempted to distinguish the supposed case from a case in which the instrument was incomplete when intrusted to the person who transferred it to the payee, but gave no reasons for the distinction.

Section 14 puts one to whom such an instrument was negotiated after completion in the same position as if it had been completed strictly in accordance with the authority given, etc.; and the only question is whether it is a negotiation to transfer the instrument after completion to the payee and this question is answered in the affirmative by the language of sections 30 and 191.

The error of the Iowa court seems to have arisen from the failure to distinguish between proximity and privity of the parties. As was said by Professor Hening:[1] "Under the law merchant there was no incongruity in permitting a payee to recover against the maker or acceptor when the payee was an innocent party deceived by the agent of the maker or acceptor. Mere proximity of the names on commercial paper is not conclusive as to privity; no more than apparent remoteness on the face of the paper is conclusive as to the absence of privity. The substance of the agreement is regarded and not the form of its expression on the commercial paper."

Speaking of the meaning of the words "immediate parties" in section 16, N. I. L., it was said by Rugg, C. J., in Liberty Trust Co. v. Tilton, 217 Mass. 462, 464, *supra*, that " 'immediate parties' in that connection exclude a party who is a holder in due course.

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[1] Hening, The Uniform Negotiable Instruments Law, 59 U. of P. Law Rev. 471, 480.

In such case these words must be confined to parties who are 'immediate' to the conditions or limitations placed upon the delivery in the sense of knowing or being chargeable with notice of them. The payee who is a holder in due course is not an immediate party in the sense of that section. This result follows from holding that a payee may be a 'holder in due course,' as defined in section 52, because he could become such holder only on condition. '4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument.' Thus he could not be such holder unless the paper was 'negotiated' to him. Therefore the word 'negotiated' was held to describe the means by which a payee might acquire a note. It was given its common legal significance of concluded by bargain or agreement. A promissory note, complete as to form and payable to a named person, may be negotiated to that person by being sold to him or taken by him for value. This is the common and popular signification of the word. It was the sense in which it was used in the law merchant before the Negotiable Instruments Act. Its meaning has not been changed by the act."

ENGLAND—

The defendant signed blank forms of promissory notes and left them with his attorney, but with no authority to complete and issue them until so instructed by telegram or letter, and the attorney without further instructions filled up the forms, making plaintiff payee, and plaintiff bought the notes *bona fide* for value, but although he knew that they had been signed in blank, and were held by the attorney under a power of attorney, made no inquiries as to its terms. *Held,* that as defendant had intrusted the blank forms to his attorney as custodian merely, and had not given him authority to issue them as negotiable instruments, he was not estopped to deny the validity of the notes. Also per Fletcher Moulton, L. J., that plaintiff was bound to inquire into the attorney's authority. Lloyd's Bank v. Cooke distinguished. Smith v. Prosser [1907], 2 K. B. 735. See also, Glenie v. Bruce Smith [1908], 1 K. B. 263, *infra,* sec. 64-2.

Cases under sections 52 and 124 should also be consulted in connection with this section.

Sec. 15. Incomplete Instrument Not Delivered.

Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.[1]

In Wisconsin "negotiation" is substituted for "delivery" at the end of the section.

[1] Not in B. E. A.

Polizzotto v. People's Bank, 125 La. 770, 51 So. 843; S. S. Allen Grocery Co. v. Bank of Buchanan, 192 Mo. App. 476, 181 S. W. 777, S. C. sec. 124.

The defendant signed a number of promissory notes, blank as to date, payee and amount, and left them on his desk in his office, whence they were stolen, filled in and indorsed to the plaintiff for value, before maturity and without notice of any defects. *Held,* that under section 15 the defendant is not liable on the notes. Section 16 applies only to complete instruments. Holzman, Cohen & Co. v. Teague, 158 N. Y. Supp. 211.

A plea averring that the delivery of a note was pursuant to an agreement between the original parties, which affects its validity but does not aver that the plaintiff-indorsee knew of the agreement or that the note was so incomplete or irregular on its face as to affect its validity, is demurrable. Bass v. Lee (Fla.), 74 So. 7.

Cases under section 124 should also be consulted.

Sec. 16. Delivery—When Effectual—When Presumed.

Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto.[1](*a*) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.(*b*) But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.(*c*) And where the instrument is no longer in the possession of a party whose signature appears thereon, a

[1] B. E. A. s. 21 (1) interpolates here the additional provision, "Provided that where an acceptance is written on a bill and the drawee gives notice to or according to the direction of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable."

valid and intentional [1] delivery by him is presumed until the contrary is proved.

The North Carolina Act omits the word "accepting" in the second sentence.

The Kansas Act omits the third sentence.

In South Dakota the third paragraph beginning with the word "but" and ending with word "presumed" is omitted, and the following sentence substituted: "An endorsee of a negotiable instrument in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable and notwithstanding any defect in the title of the person from whom he acquired it."

AMES: The doctrine of section 16, that one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from someone else after his death, is somewhat startling at first. But it should commend itself on reflection. It has been adopted, after much consideration, in Germany.

The Bürgerliches Gesetzbuch, section 794, referred to by Professor Ames, applies to other instruments payable to bearer, but not to bills and notes, since such instruments payable to bearer are not authorized by the German code. Ed.

Section 16 (N. I. L.) goes beyond the German law, for it applies even to the case of an undelivered bill or note made payable to order, stolen by the payee, indorsed by him and negotiated to a holder in due course, thus codifying such extreme cases as Clarke v. Johnson, 54 Ill. 296, and Shipley v. Carroll, 45 Ill. 285. Ed.

(*a*) Ard v. Bowie, 125 Ark. 169, 187 S. W. 1066; Viets v. Silver, 15 N. Dak. 51, 106 N. W. 35.

A bill of exchange payable to the order of the drawer does not come into existence until it is delivered as well as indorsed by the payee. Stouffer v. Curtis, 198 Mass. 560, 85 N. E. 180.

A note takes effect from the time of its delivery and not from its date. The N. I. L. was not cited. Burr v. Beckler, 264 Ill. 230, 106 N. E. 206, L. R. A. 1916A, 1049.

A note deposited in the United States mail as designated by the person to whom it was to be sent, was delivered, and took effect upon such deposit. Ib.

[1] The English Act reads "unconditional" instead of "intentional." B. E. A. s. 21 (3).

The president of a corporation signed and handed to the payee a note of the corporation with the understanding that it was not to be effective until signed by the treasurer also. *Held,* there was no delivery. The N. I. L. was not cited. Continental Engine Co., *In re,* 234 Fed. Rep. 58, 148 C. C. A. 74.

The defendant drew checks to the order of plaintiff and handed them to plaintiff, who indorsed them each to a named person and gave them to defendant to mail to the respective indorsees, but defendant failed to do so. Plaintiff sued defendant for conversion. *Held,* that the checks had been delivered by defendant to plaintiff and that defendant was liable for their conversion. The N. I. L. was not cited. Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065.

ENGLAND—

A bill of exchange was indorsed and handed to the payee's bankers to be discounted. Some days later the bankers credited the payee's account with the bill. *Held,* that the property in the bill did not pass to the bankers until it was discounted by them. Dawson v. Isle [1906], 1 Ch. 633.

(*b*) Bank of Tallasee v. Jordan (Ala.), 75 So. 930, S. C. sec. 52; Bank of Cartersville v. Gunter, 4 Ala. App. 539, 58 So. 757; Sayre v. Leonard, 57 Colo. 116, 140 Pac. 196; Wilmington Trust Co. v. Morgan, 28 Del. 261, 92 Atl. 988; Bartholomew v. Fell, 92 Kan. 64, 139 Pac. 1016; Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923; Borough of Montvale v. Peoples' Bank, 74 N. J. Law, 464, 67 Atl. 67, S. C. sec. 56; Grannis v. Stevens, 216 N. Y. 583, 111 N. E. 263; Morris-Miller Co. v. Von Pressentin, 63 Wash. 74, 114 Pac. 912, S. C. sec. 89.

"'Immediate parties,' in section 16, excludes a party who is a holder in due course. In such case these words must be confined to parties who are 'immediate' to the conditions or limitations placed upon the delivery in the sense of knowing or being chargeable with notice of them. A payee who is a holder in due course is not an immediate party in the sense of that section." Rugg, C. J., in Liberty Trust Co. v. Tilton, 217 Mass. 462, 464, 105 N. E. 605, L. R. A. 1915B, 144.

"A promissory note complete as to form and payable to a named person, may be negotiated to that person by being sold to him or taken by him for value. This is the common and popular signification of the word. It was the sense in which it was used in the law merchant before the Negotiable Instruments Act. Its meaning has not been changed by the act." National Investment Co. v. Corey, 222 Mass. 453, 111 N. E. 357, accord, S. C. sec. 14.

Under this section defendant may show that the note was without consideration and that it was not intended by the parties that the property therein was to be transferred by its delivery to plaintiff. Lee v. Benjamin (R. I.), 102 Atl. 713.

It is error to admit evidence that a note was delivered on an unfullled condition when such defense was not pleaded. Bloom v. Horwitz, 97 Misc. Rep. 622, 162 N. Y. Supp. 230.

Indorsement of a note before delivery to the payee may be conditional, but to be binding on the payee such conditions must be accepted by him, made with notice to him or acknowledged on his part before or accompanying delivery and these facts must be pleaded and proved with common certainty. Farmers' & Stockgrowers' Bank v. Pahvent Valley Land Co. (Utah), 165 Pac. 462, S. C. sec. 124.

The burden is on defendant to prove an averment that the note sued on was delivered upon a condition. Smith v. Brown (Utah), 165 Pac. 468.

Under the last clause of section 16 and section 14, the burden is on the defendant to show the agreement under which a negotiable instrument signed in blank was delivered and that the terms have been violated. Madden v. Gaston, 137 App. Div. 294, 121 N. Y. Supp. 951, S. C. sec. 14.

The provisions of this section refer to a conditional or special delivery to the payee or holder, of which he is advised at the time and not to a delivery by an obligor to an agent or intermediary for transmission to the payee. Therefore one who signed as surety-maker, relying on a false statement of the principal-maker that the signature of another ostensible surety was genuine, and upon the violated condition that other named persons were to sign as co-sureties before delivery to the payee, is liable to the payee who took the note for value in good faith without notice of the fraud or breach of agreement. *Ex parte* Goldberg & Stone, 191 Ala. 356, 67 So. 839, S. C. secs. 14, 52(a).

Defendant signed a note payable to a bank and put it into the hands of the cashier with an assignment of shares of stock in the X Company, under an agreement that if defendant decided to purchase the stock the note was to become binding and valid, but otherwise the note was to be returned to defendant. *Held*, a conditional delivery of the note and the note unenforceable in the hands of the bank, defendant having notified the cashier that he had decided not to purchase the stock and demanded the return of the note. Union Investment Co. v. Epley, 164 Wis. 438, 160 N. W. 175, S. C. sec. 52.

In an action against the indorsers of a note, it is a good defense as against the payee that the defendants indorsed the note on condition that the payee would secure additional indorsers before the note should be binding on them, which the payee agreed but failed to do; and an answer setting up such facts sufficiently pleads a conditional delivery of the note. Seattle National Bank v. Becker, 74 Wash. 431, 133 Pac. 613.

Evidence of a contemporaneous oral agreement is admissible as against parties not holders in due course to show that the instrument was not to take effect until some condition was performed. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192, S. C. secs. 52-3, 55; Hill v. Hall, 191 Mass. 253, 77 N. E. 831; Norman v. McCarthy, 56 Colo. 290, 138 Pac. 28; Sayre v. Leonard, 57 Colo. 116, 140 Pac. 196; Devine v. Western Slope Assn., 27 Colo. App. 368; First State Bank v. Kelly, 30 N. D. 84, 152 N. W. 125; Harder v. Reinhardt, 162 Wis. 558, 156 N. W. 959; Selma Sav. Bank v. Harlan, 167 Iowa, 673, 149 N. W. 882; see also, Key v. Usher, 30 Ky. L. Rep. 667, 99 S. W. 324; Smith v. Dotterweich, 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. (N.S.) 829; Fidelity Title Guaranty Co. v. Ruby, 16 Ariz. 75, 141 Pac. 117. The N. I. L. was not cited in the last three cases.

That the delivery of a note was upon a condition may be shown by oral evidence, thus changing the former rule in Illinois. Straus v. Citizens State Bank, 164 Ill. App. 420.

As between the payee and a surety, evidence is admissible to show that the surety signed on condition that before the note was delivered the principal should give certain security to the payee, and that the payee had knowledge of the condition before delivery of the note to him. The N. I. L. was not cited. Goutermont v. Bland, 99 Kan. 431, 162 Pac. 270.

Where a father sued his son on notes given to the father, the son is entitled to prove by parol that the notes were not delivered with intent to create a debt in favor of the father, but merely to evidence advancements made by the father to the son. Storey v. Storey, 131 C. C. A. 269, 214 Fed. 973.

In an action by the payee against the drawer of a check, parol evidence is admissible to show that the delivery was conditional or that the instrument was not to be paid unless a certain event took place. The Statute of Frauds does not require the contract for conditional delivery to be in writing. Norman v. McCarthy, 56 Colo. 290, 138 Pac. 28; Niblock v. Sprague, 200 N. Y. 390, 93 N. E. 1105, accord, not citing the N. I. L.

In an action by the indorsee against an indorser of a promissory note, parol evidence is admissible to show that the note was indorsed and delivered by the defendant to the plaintiff on a condition which has never been performed. The N. I. L. was not cited. Gamble v. Riley, 39 Okla. 363, 135 Pac. 390.

Evidence of a contemporaneous verbal agreement that the payee would renew the note twice for a similar period, and at the end of that time would accept a re-transfer of stock, for which the note was given, at the maker's election, was admissible to show that the note was never delivered with intent that it should constitute a completed instrument in *presenti*. Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841, S. C. sec. 52. *Sed quaere*, whether this case was not a case of condition subsequent which could not be shown by parol to defeat the note? See dissenting opinions.

In Martineau v. Hanson, 47 Utah, 549, 155 Pac. 432, the maker was permitted to show by parol, as against the payee, that the note was delivered on a condition that it was not to be paid until a third person paid to the maker a specified sum, which had not been paid. Here again the court failed to distinguisn between a case where the note was not to take effect until the performance of a condition, and therefore the rule against parol evidence to vary a written contract did not apply, because the evidence was to show that there was no contract, and a case in which the parol evidence merely showed that in a certain event the note was not to be paid. The court cited in its support Hodge v. Smith, *supra*, p. 61, which was a case of the first kind.

The language of the section that the delivery may be shown to have been conditional or for a special purpose, and not for the purpose of transferring the property in the instrument is somewhat ambiguous. If the last clause qualifies both a conditional delivery and a delivery for a special purpose, it would seem that where the delivery is conditional and no property in the instrument passes, we have a case of the first kind and not of the second. Moreover, in any case, the statute not speaking on the question as to the kind of evidence by which delivery may be shown to be conditional, recourse must be had to the common law, where the distinction is made between the two classes of cases, which may be generally described as those in which the condition is a condition precedent to the existence of the contract, and those in which it is a condition to liability on an existing obligation.

In an acton by the payee against the maker, an affidavit of defense tended to show that the note was not to be paid until certain buildings were sold, and that they had not been sold: *Held*, to state evidence that was not admissible, because in variance of the terms of the written agreement. Homewood People's Bank v. Heckert, 207 Pa. 231, 56 Atl. 431.

Evidence is admissible of a parol contemporaneous agreement that a note was delivered by the maker to the payee upon a condition that the maker should be able to raise money by a certain date prior to the maturity of the note, and a negotiation of the note prior to such date is a negotiation in breach of faith which puts on the holder the burden of showing that he is a holder in due course. Waukee Sav. Bank v. Jones, 179 Iowa, 261, 159 N. W. 691.

An answer alleging that it was agreed between the payee and the maker that the note was to be used by the payee to raise money to buy stock to be sold at an advance, the first proceeds to be used to pay the notes, does not show a conditional delivery, but an oral agreement prior to execution affecting the manner of payment of the note which can not be used to modify or overcome the promise to pay. Gwinn v. Ford, 85 Wash. 571, 148 Pac. 891.

An answer that the parties made a parol agreement that the maker should not be liable for one-half the note, is not a defense in law. Bailey v. Lankford (Okla.), 154 Pac. 672.

Oral conversations at the time a note representing a loan was made and delivered, that the money would not be demanded until a certain event had happened, are admissible only if tending to prove that there was to be no contract until the event happened and not to vary or explain the agreement. Weinhandler v. Loewenthal, 159 N. Y. Supp. 695.

In Rubel v. Honig, 178 App. Div. 53, 164 N. Y. Supp. 219, the court cited this section in support of the proposition that it may be shown that a note had no valid inception, the delivery being on a condition which had not been fulfilled. But as the note was not negotiable, the section had no application and was unnecessary to the decision.

Parol evidence is not admissible to vary the unqualified terms of a note by proving an agreement that it shall be paid in installments. Nalitzky v. Williams, 237 Fed. Rep. 802, 151 C. C. A. 44, S. C. secs. 29, 120.

A parol contract, made at the time of or prior to the execution of a negotiable promissory note, can not be pleaded or proved to show that the note was not to be paid at maturity, but was to be extended. Commercial Nat. Bank v. Hutchinson Box Co., 98 Kan. 350, 158 Pac. 44. Or to show that the maker was not to be called on to pay the note. Stevens v. Inch, 98 Kan. 306, 158 Pac. 43. Or that the note was to be surrendered upon the performance of a condition subsequent. Post v. Tamm, 91 Wash. 504, 158 Pac. 91. The N. I. L. was not cited in these cases.

Defendant, not pleading fraud, accident or mistake, can not show a collateral parol agreement that the note should not be payable at the time therein stated, but at a later time, as this would tend to prove a different contract. Cherokee Co. v. Meroney, 173 N. C. 653, 92 S. E. 616.

In a suit upon a note, parol evidence that a further oral agreement was made that if the land for which the note was given was recovered by a person named, the note was to be paid, otherwise not, and that the land was not so recovered, was admissible to show that the note was executed upon the condition of a contingency as to its payment, and also to show failure of consideration. The N. I. L. was not cited. Farrington v. McNeill, 174 N. C. 420, 93 S. E. 957.

ENGLAND—

In an action on a promissory note against the maker, who did not appear, and an endorser, the latter denied liability on the ground of a contemporaneous oral agreement with the plaintiff that he should not be called upon to pay on the note if certain goods supplied by the plaintiff to the maker, in respect of which the note was given, should be unequal to sample. *Held*, that the agreement relied on was in defeasance of the contract in the promissory note and, as it was not in writing, evidence in support of it was inadmissible. Hitchings, etc., Co. v. Northern Leather Co. [1914], 3 K. B. 907.

(*c*) Chandler v. Hedrick, 187 Mo. App. 664, 173 S. W. 93; Colburn v. Arbecam, 54 Misc. Rep. 623, 104 N. Y. S. 986; Moak v. Stevens, 45 Misc. Rep. 147, 91 N. Y. Supp. 903; Newcombe v. Fox, 1 App. Div. 389.

A holder in due course can recover upon a negotiable note indorsed in blank by the payee and stolen from him. Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959 (action against payee as indorser), S. C. secs. 9-5, 56, 124, 191; Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N. Y. Supp. 922 (action against maker-payee); Poess v. Twelfth Ward Bank, 43 Misc. Rep. 45, 86 N. Y. Supp. 857 (drawer-payee of check), *semble*, S. C. secs. 51, 187.

In Angus v. Downs, 85 Wash. 75, 147 Pac. 630, L. R. A. 1915E, 351, a holder in due course was allowed to recover against the maker of a negotiable note which had been stolen from the maker. It does not appear from the report whether the note was payable to bearer or to a named payee and indorsed by him. Probably the latter was the case, since the complaint alleged that the note had been assigned to plaintiff.

In Schaeffer v. Marsh, 90 Misc. Rep. 307, 153 N. Y. Supp. 16, a check was stolen from the maker by the payee and by him indorsed and negotiated to the plaintiff in due course, who was held entitled to recover against the maker.

In Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923, the payee indorsed to plaintiff, a holder in due course, a check which had been delivered to the payee without authority by the drawer's bookkeeper. *Held*, that plaintiff could recover from the drawer.

A joint and several note was paid before maturity by the principal-maker to the payee. Subsequently the maker returned the note to the payee for a special purpose. In disregard of this purpose, the payee transferred the note before maturity to plaintiff, a holder in due course. *Held*, that plaintiff could recover against the principal-maker and also against a surety co-maker. Critser v. Steeley (Okla.), 162 Pac. 795.

In Town of Newbern v. National Bank, 234 Fed. 209, 148 C. C. A. 111, the rule of this section was applied in favor of a holder in due course of negotiable bonds issued by a municipal corporation in Tennessee, although it was claimed that there was no valid delivery to the one through whom such holder traced his title.

In Sheffer v. Fleischer, 158 Mich. 270, 122 N. W. 543, holding, that no delivery is a defense even as against a holder in due course, the date of the notes does not appear, but they must have been executed before the N. I. L. was adopted in that State (June 1905) otherwise the decision is erroneous.

In City of Adrian v. Whitney Central Nat. Bank, 180 Mich. 171, 146 N. W. 654, negotiable municipal bonds, payable to bearer, were stolen and negotiated to a purchaser in good faith. *Held*, that he acquired a valid title to the bonds.

Sec. 17. Construction Where Instrument is Ambiguous.

Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:—

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;[1](*a*)
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;(*b*)
3. Where the instrument is not dated, it will be considered to be dated as of the time is was issued;[2]
4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;[2](*c*)
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;[2](*d*)
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;[3](*e*)
7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.[4](*f*)

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[1] The last clause of 1 is not in the corresponding section of the English Act. B. E. A. s. 9 (2).

[2] Not in B. E. A.

[3] "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." B. E. A. s. 56.

[4] "Where a note runs 'I promise to pay,' and is signed by two or more persons, it is deemed to be their joint and several note." B. E. A. s. 85 (2). No similar provision as to a bill appears in B. E. A.

The North Carolina Act originally adopted section 17 in full, but the revisal of 1908 (section 2341) omits subsection 2, which is transferred to the chapter on Interest, and becomes section 1952-1 of the revisal.

The Wisconsin Act adds: "8. Where several writings are executed at or about the same time, as parts of the same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

(*a*) Altering the marginal figures of a check to make them correspond with the amount stated in written words, which are not ambiguous or uncertain, is not forgery. The People v. Lewinger, 252 Ill. 332, 96 N. E. 837, Ann. Cas. 1912D, 239.

IRELAND—

A note with no sum in the body, but with the figures £50 in the upper left-hand corner, was held to be a valid promissory note, within section 9(2), Bills of Exchange Act (section 17-1, N. I. L.). Heeney v. Addy [1910], 2 Irish Rep. 688, 24 Harvard Law Rev., 400.

(*b*) A note is none the less negotiable because a blank is left for the rate of interest. In such case the legal rate applies. Franklin Nat. Bank v. Roberts Bros., 168 N. C. 473, 84 S. E. 706, S. C. sec. 25.

(*c*) On a blank printed form of note the blanks were filled in on a typewriter. In the blank space for interest after the printed word "at" were typewritten "7 per cent. from date." A circle was drawn around the figure 7 with pen and ink and above it the figure 8 was made with pen and ink. Defendant contended that the note was not negotiable because of uncertainty in the rate of interest. *Held*, that the typewritten part must be considered as printed within the meaning of the statute, that the written rate prevails and that there is no uncertainty therein. Acme Coal Co. v. Northrup Nat. Bank, 23 Wyo. 66, 146 Pac. 593, L. R. A. 1915D, 1084.

(*d*) An instrument in the following form:

"$1000. New York 190

Pay to the order of Rosario Didato

Value received and charge on account to 38 Stanton Street.

Lansa Rosalia."

may be declared upon as a promissory note. Didato v. Coniglio, 50 Misc. Rep. 280, 100 N. Y. Supp. 466.

(*e*) This provision applies only to cases of doubt arising out of the location of the signature. Therefore one who signed in the place of the maker's name is not an indorser. Germania Natl. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, S. C. secs. 63, 64.

And parol evidence is not admissible to show that he intended to be an indorser. Lumbermen's Nat. Bank of Portland v. Campbell, 61 Ore. 123, 121 Pac. 427.

A corporation indorsed the note of a third party and when sued claimed that it was surety and that it had no power to become a surety on the note. *Held,* that parol evidence was admissible to show that the corporation signed as surety, although the note recited that every party signing or indorsing the note bound himself as principal and not as surety. Spencer v. Alki Point Transportation Co., 53 Wash. 77, 101 Pac. 509, S. C. sec. 52-2.

A note reading, "I promise to pay," etc., signed by X and by Y in the order named, was payable to the order of Y and was negotiated by Y to plaintiff, but was not indorsed by Y. *Held,* that it must be supposed that Y signed the instrument with the purpose of being bound, that the only way he could be bound was as an indorser, and that it must therefore be concluded that he intended so to bind himself. Moore v. Carey, 138 Tenn. 332, 197 S. W. 1093.

(f) Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180; Proctor v. Banby, 90 Conn. 251, 96 Atl. 935; Churchill v. Miller, 90 Wash. 694, 156 Pac. 851; Anderson v. Stayton State Bank, 82 Ore. 357, 159 Pac. 1033.

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"On demand after date I promise, etc.," signed by two, is joint and several, under section 17-7, and the holder may proceed against one party in equity and the other at law. Lewenstein v. Forman, 223 Mass. 325, 111 N. E. 962.

Sec. 18. Liability of Person Signing in Trade or Assumed Name.

No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.[1]

The Wyoming Act omits the word "expressly" in the first sentence.

[1] The English Act adds: "The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm." B. E. A. s. 23 (2).

New York Life Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559, 121 Am. St. Rep. 362; First Nat. Bank v. Cottonwood Land Co., 51 Mont. 544, 154 Pac. 582; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

This section has no application to an oral guaranty by the payee upon transferring a note for value without indorsement, the guaranty being an original and absolute obligation to which the note is collateral. Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, S. C. sec. 49. Such oral guaranty is not within the Statute of Frauds, *Ib.*

A note signed by one partner alone was given in payment for goods bought for the firm. *Held,* that only the partner who signed the note was liable thereon. The N. I. L. was not cited. Logan v. Parson, 79 Ore. 381, 155 Pac. 365.

The defendants were partners under the firm name of "The Oregon Locators.' A note was given for firm purposes signed, "The Oregon Locators, by F. L. Granger, member of the firm authorized to sign the firm name." *Held,* that all the partners were liable on the note. Frazier v. Cottrell, 82 Ore. 614, 162 Pac. 834.

Sec. 19. Signature by Agent—Authority—How Shown.

The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.[1]

The Kentucky Act substitutes: "The signature of any party may be made by an agent duly authorized in writing."

Under this section, as enacted in Kentucky, it has been held that the authority of an agent to execute a negotiable instrument must be in writing, but authority to execute a non-negotiable instrument is not required to be in writing. Finley v. Smith, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777, S. C. sec. 5.

This section permits proof of the ostensible authority of the agent to act for a corporation in issuing negotiable paper; but what shall constitute sufficient proof of such authority is left to the common law. Grant Co. State Bank v. N. W. Land Co., 28 N. D. 479, 150 N. W. 736.

When an instrument payable to X. was indorsed "X by Y with power of attorney," plaintiff, in order to prove his title, must show the authority of the agent to indorse. Scotland County Nat. Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539, S. C. sec. 30.

[1] The last sentence of this section is omitted in the English Act. B. E. A. s. 91 (1).

Sec. 20. Liability of Person Signing as Agent, Etc.

Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized;[1] but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.[2]

The Virginia Act inserts after "capacity" in line four, the words "without disclosing his principal."

AMES: Under this section, an agent signing without authority of the principal is, by implication, liable on the instrument. This is unjust and a departure from the English Act and the almost uniform current of judicial decisions by which the agent is liable only on his implied warranty of authority. According to this rule the measure of damages would be nominal, if the principal should happen to be bankrupt; whereas under section 20 it would be the amount of the instrument.

BREWSTER: There is no injustice. The agent should know whether he has authority. He should be liable as the maker of the note. Such is the rule of the German code.

MCKEEHAN: The rule of section 20, though difficult to justify on principles of contract, has important practical advantages. It increases negotiability and enables plaintiff to prove with ease and certainty the amount to be recovered.

In an article in 10 Law Notes (American), 104, a writer signing himself "L. P. M.," contends that the clause "he is not liable on the instrument if he was duly authorized" does not warrant the implication that the unauthorized agent is liable on the instrument.

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[1] The words "if he was duly authorized" are not in the English Act. B. E. A. s. 26 (1).

[2] The English Act adds: "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted." B. E. A. s. 26 (2).

Page v. Ford, 65 Ore. 450, 131 Pac. 1013, Ann. Cas. 1915A, 1048, S. C. secs. 1, 8-4, 38; Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, S. C. sec. 17-6, 63, 64.

The plain language of this section indicates that it was the intention of the draftsman and the commissioners to clear up the unnecessary and unpardonable confusion caused by the failure of some of the courts to exercise a little common sense and to recognize mercantile usage. Much of the difficulty found in this subject is purely manufactured and would not trouble a business man for a moment. He would perceive no difference between notes signed, "The X Co. by A, Pres.," or signed "The X Co., A, Pres.," or signed "X Co., A, Pres.," or "A, Pres., X Co.," or a note reading "The X Co. promises to pay" and signed "A, Pres.". Yet courts have been found to make distinctions in such cases. For instance, in Reeve v. First Bank, 54 N. J. L. 208, 23 Atl. 853, 16 L. R. A. 143, a note signed "Warrick Glass Works, J. Price Warrick, Prest.," was properly held to be the note of the corporation, and not the note of Warrick or the joint note of Warrick and the corporation, so also in Aungst v. Creque, 72 Oh. St. 551, 74 N. E. 1073. Whereas in McCandless v. Belle Plaine Co., 78 Iowa, 161, 42 N. W. 635, 4 L. R. A. 396, it was held that such a note is the note of the signer, that oral evidence was not admissible to show that the corporation alone was intended and that both were liable. And in Day v. Ramsdell, 90 Iowa, 731, 52 N. W. 208, a note reciting that, "We, the A. B. Co., promise to pay," but signed merely by two persons describing themselves as President and Secretary, was held to be their individual obligation. In 17 Banking Law Journal, 305-306, it was properly said that "nine business men out of ten would regard such a note as that of the company," and it would hardly be an exaggeration to include the tenth man. The same New Jersey court that decided Reeve v. First Bank, *supra,* also said in the same case that a note signed "J. Price, Pres., Warrick Glass Works," nothing appearing in the body of the note to indicate who is the maker, is *prima facie* the note of J. Price. Here again a business man would regard this as a note of the company. In Miller v. Roach, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71, a note reciting "We promise to pay," was signed "John Roach, Treas." Stamped on the paper was the impression of a large circular seal, around the edge of which was printed the name of a company so placed that the circumference passed through the final letter of Roach and the word treasurer. This was held to be the note of the company.[1] Whereas in Dutton v. Marsh, L. R. 6 Q. B. 361, where a note reciting "We, the directors of the A. B. Co., promise, etc.," was signed by four persons, one of whom added the word "Chairman" after his name, with the company's seal in the corner, it was held that the signers were indi-

[1] Reed v. Fleming, 209 Ill. 390, 70 N. E. 667, accord.

vidually liable, that the affixing of the seal was not enough to exclude personal liability and to show that it was the company's note. Distinctions have been made between the case of a note signed "A. B. Agent, C. D. Co.," and a note signed "A. B. Agent for C. D. Co.," it being held that in the former case A. B. was personally liable, in the latter that he was not. Barker v. Mechanic Ins. Co., 3 Wend. 94. Here again a business man would see no distinction. He would regard both signatures as being made on behalf of the company.

In some states where the name of a company is printed at the head or on the margin of the instrument and the note is signed "A. B., Pres.," for instance, the instrument has been held to be sometimes presumptively, sometimes conclusively, the instrument of the company. Second Bank v. Midland Co., 155 Ind. 581.[1] See also, Carpenter v. Farnsworth, 106 Mass. 561, where the court said (p. 562): "The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties."

On the other hand, the contrary has been held in C. N. Bank v. Clark, 139 N. Y. 307, and First Nat. Bank v. Wallis, 150 N. Y. 455. Some courts have treated the instruments in some of these cases as ambiguous and have admitted parol evidence to show the intention of the parties. It is submitted that a court wishing to construe the language of section 20 in accordance with the evident intention of the draftsman and not disposed to interpret it with a desire to adhere to any former rule in the state, ought to find little difficulty in these cases. Section 20 is taken from section 26 of the Bills of Exchange Act, but is made stronger by the addition of the words "where the instrument contains," which are not to be found in the section of the Bills of Exchange Act. Notes signed by individuals with the addition of such words as agent, president, secretary and the like, without disclosing any principal, either in connection with the signatures or in the body of the instrument, naturally had to be treated as the notes of the individuals because the doctrine of undisclosed principal had not been applied to contracts made in the form of negotiable instruments, and therefore, unless the signer could be held the notes would be invalid. This limitation of the doctrine of undisclosed principal was proper because that doctrine would impair the value of the negotiable instruments for purposes of circulation. But it seems a narrow view and not in accordance with mercantile understanding to impose individual liability upon a signer who, being duly authorized to sign, discloses the name of a principal on the instrument, and indicates that he himself is an agent or officer, without regard to the form in which this is done. And it is submitted that such a person is within the meaning of the words of section 20

[1] In this case the opinion of the court contains a valuable discussion of the subject from the business point of view. See also 2 Thompson on Corporation, 2d ed., sections 1897, 1898.

providing that "where the instrument contains, or the person adds to his signature, words indicating that he signs for or on behalf of a principal or in a representative capacity, he is not liable on the instrument if he was duly authorized." In most of the cases decided since the act, the courts have construed the act in this reasonable manner, but some courts unfortunately have seemed unwilling to depart from the old rule of the state, where it was different, and have held that the statute makes no change.

Defendant signed a note reading, "I promise to pay," etc., Hanson Bros., by Erastus Hanson." *Held*, that defendant's signature was that of an agent for a disclosed principal and that he was not personally liable, as it was not alleged that Hanson Bros. was a partnership and that defendant was a member. The N. I. L. was not cited. Somers v. Hanson, 78 Ore. 429, 153 Pac. 43.

A note read as follows:

$215.75. Ridgeway, Pa., Nov. 26, 1902.

Gardner Shingle Company, Ltd.,

Three months after date we promise to pay to the order of The Abbey Press, Two hundred and fifteen, 75-100 dollars, at Elk County National Bank, without defalcation, value received.

George A. McClain, Secretary. A. M. McClain, Treasurer."

Held, citing section 20, N. I. L., that the note plainly indicated on its face that it was the note of the Gardner Shingle Company, Ltd., and being in writing, and signed by two of the partners, one as secretary and the other as treasurer, conclusively indicated that these persons did not make and execute the paper in their individual capacity. Chatham Nat. Bank v. Gardner, 31 Pa. Super. Ct. 135.

The note was as follows:

"German American Investment Co., Inc., No. 409.

$600.00. Seattle, Wash., Feb. 8, 1902.

Received from Herman Daniel $600, Six Hundred Dollars, which we promise to pay six (6) months after date with interest at the rate of eight (8) per cent. per annum.

H. M. Glidden, Secretary. Wm. H. Buttner, President."

The name of the company at the top was lithographed on a blank form of receipt on which the note was written. The seal of the company was impressed upon the paper but no reference made to it in the note. The defendants were held liable on the ground of false representation as to the solvency of the German American Investment Co., but the court further held that there were no words used in the note showing that the corporation was obligated, and that no obligated principal was disclosed, and that therefore the defendants Glidden and Buttner were individually

liable. Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811, *sub nomine*, Daniel v. Buttner.

It is submitted that this decision is in the teeth of the statute. Not only from a common sense point of view did the instrument contain words, but in addition the signers added words indicating that they signed for or on behalf of the principal who was disclosed both by the name at the top of the instrument and upon the seal.

A note was signed "A, Treas. X Engine Co., B, Pres. X Engine Co." Evidence was received that A and B signed as officers of the company under direction of the directors and that both the payee and A and B believed they were signing the note of the company which was given in payment of a claim against the company. Under the law before the act, the note would not have been the note of the company, but the personal note of A and B. *Held*, that this rule was changed by section 20, N. I. L., under which "if the person signing a promissory note adds to his signature words describing himself as agent or as occupying some representative position, which at the same time discloses the name of the principal he shall be exempted from personal liability, while if he writes the name of the principal, although adding words of agency, he will be personally liable." Under this section "the agent now relieves himself from liability by a form of signature whereby he is described as agent of a disclosed principal." Jump v. Sparling, 218 Mass. 324, 105 N. E. 878.

A note which recited, "I, we (and each of us), promises to pay," etc., was signed "The Akron Co. (Corporate Seal), R. A. S. Prest., H. C. B. Secretary." It was admitted that the note was given for a debt due by the company to plaintiff. *Held*, that this was the note of the company alone and not of R. A. S. and H. C. B. The N. I. L. was not cited. New England Electric Co. v. Shook, 27 Colo. App. 30, 145 Pac. 1002.

A note payable "to the order of ourselves" was signed, "First United Presbyterian Church, 16 West 108th St., Pres. John Elliott, Treas. Edward A. Shea." On the back was the indorsement: "First United Presbyterian Church, John Elliott, Pres., Edward A. Shea, Treas., Finance Committee, John Elliott, Edward A. Shea, John McKee." *Held*, that the members of the committee and the president and treasurer were not personally liable on the note. Chelsea Exch. Bank v. First United Presbyterian Church, 89 Misc. Rep. 616, 152 N. Y. Supp. 201.

A note reading, "We promise to pay," etc., contained the statement, "For money loaned to A. M. E. Z. Church," and was signed "A, Chm., B, Sec.," and by several other persons, who were trustees of the church. *Held*, that this was the note of the church and that if the trustees were authorized to execute it on behalf of the church they were not personally liable. Wilson v. Clinton Chapel, etc., Church (Tenn.), 198 S. W. 244.

A note reading: "I, we, or either of us, as principals," etc., and signed "Blue Bell Mining Co., Frank Chesley, Pres., Vera E.

Whitten, Secy.," was held to be ambiguous and that parol evidence was admissible to show whether the defendant Chesley signed individually or only in his official capacity. The court queried whether the note did not conclusively show that the defendant signed as an agent of the corporation. Myers v. Chesley, 190 Mo. App. 371, 177 S. W. 326.

A bill of exchange signed "C. J. Hicks, Agent, Ariss, Campbell & Gault," is the bill of the firm and not of Hicks. who had authority to draw the bill. Section 19, N. I. L., was cited, but not section 20. Citizens Nat. Bank v. Ariss, 68 Wash. 448, 123 Pac. 593.

A note reading, "We promise to pay," was signed "Briel Shoe Co., Fred C. Briel, Prest., J. H. Taylor, Mgr." It was held that this instrument imposed, *prima facie*, a personal liability upon Briel and Taylor, subject, however, to be shifted by pleading and proof. The court said that section 20 is declaratory of the law as it always has been in Alabama, citing a number of cases. Briel v. Exchange National Bank, 172 Ala. 475, 55 So. 808. It is submitted that this decision, which is *contra* to Jump v. Sparling, *supra*, p. 73, and the above cited cases, is an example of the narrow spirit in which the interpretation of the act is sometimes approached. There was no claim in the case that the signers were not authorized by the corporation. It is clear that the signers added to their signatures words, indicating that they signed in a representative capacity, and that they disclosed their principal. If the principal had been named in the the body of the instrument no doubt the court would have held differently, but the section does not require this. Also, if the signers had interpolated the word "by" between their names and their official designations, no doubt the court would have held differently. But the manner in which this instrument is signed is so common in the business world and so well understood to mean the same thing as if the word "by" had been interpolated, that it would seem that the courts, even without the aid of section 20, ought to treat this as *prima facie* the obligation of the principal, if not conclusively so.

On the second trial of this case it was found upon the evidence that it was the intention of the defendants, and so understood by the plaintiff, that the defendants B and G should be personally bound upon the note and judgment in favor of the plaintiff was affirmed by the Supreme Court. Briel v. Exchange Nat. Bank, 180 Ala. 576, 61 So. 277. *Sed quaere* as to the correctness of this finding upon the evidence adduced?

A note was signed "The X Co. A Pres., B Sec'y." In an action by the payee against A and B, *held*, that evidence was admissible to show that the note was the obligation of the company and not of A and B. If no representations were made to the payee, his understanding could not debar the defendants from showing their intention in signing. Former cases in the State were cited, but the N. I. L. was not. Western Grocer Co. v. Lackman, 75 Kan. 34, 88 Pac. 527.

A note reading, "I promise to pay," etc., was signed "International Electric Piano Co., M. D. Gross, Pres., Tekla Rossman." *Held,* that Tekla Rossman was liable thereon to the payee, although she was secretary of the corporation and intended to sign merely as secretary, and the payee knew of her official capacity.

Another note reading, "We promise to pay," etc., was signed "M. D. Gross, Tekla Rossman, Secy." There was no reference in the note to a corporation. *Held,* that Tekla Rossman was liable thereon to the payee, though she was secretary and intended to sign as such and the payee knew of her official capacity. Rudolph Wurlitzer Co. v. Rossman, 196 Mo. App. 78, 190 S. W. 636, S. C. sec. 28.

A note was signed with the corporate name of a corporation "by H. O. H., President, J. E. S.," the latter name being that of the secretary. *Held,* that by its terms the note imposed a personal liability in J. E. S. which he can not escape without showing by clear and convincing evidence that he signed in this manner through a mutual mistake of the parties, or that the payee obtained his signature through fraud or misrepresentation. Exchange Bank v. Schultz, 167 Iowa, 136, 149 N. W. 99.

A note read, "We promise to pay," and signed "The X Co., J. L. M." *Held,* ambiguous and that evidence was admissible to show that the note was that of the company and accepted as such by the payee. The N. I. L. was not cited. Dunbar Co. v. Martin, 53 Misc. Rep. 312, 102 N. Y. Supp. 91.

The note read, "Four months after date the Northwestern Straw Works promises to pay, etc. The Northwestern Straw Works, E. R. Stillman, Treasurer, John W. Mariner." *Held,* that as to Mariner the note was ambiguous and parol evidence was admissible to show that he signed in a representative capacity and as agent of the corporation. As to Stillman, *semble,* that the note itself made it clear that he signed only on behalf of the corporation and that parol evidence would not be admissible to show that he signed as a joint maker. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, S. C. secs. 17-6, 63, 64.

A note read, "The X Company promises to pay," and was signed by "A, Pres., B, Vice-Pres., and C, Sec. & Treas.," and by two others. The note was held to be ambiguous because of a clause waiving rights of exemption which could not apply to the corporation, and parol evidence was admissible to show in what capacity the defendant A, B, and C signed. The N. I. L. was not cited. Planters Chemical, etc., Co. v. Stearns, 189 Ala. 503, 66 So. 699.

In an action on a note signed "Board of Trustees, A, Chairman, B, Secy.," evidence was given (apparently without objection) that the note was given for school furniture, that credit was extended to the board of trustees and not to A or B as individuals, that plaintiff's agent, who negotiated the transaction, knew that A and B did not intend to become personally responsible and received no consideration. *Held,* that upon this evidence a gen-

eral charge in favor of A and B was proper, without regard to the question whether the form in which the note was signed would make them individually liable. Peabody School Furniture Co. v. Whitman, 6 Ala. App. 182, 60 So. 470.

A note reading, "We promise to pay," was signed "Belmont Dairy Co., Inc., E. C. Thomas." *Held,* that Thomas was *prima facie* liable as a maker. To escape on the ground that he signed merely to complete the signature of the corporation and not with the intention to be personally liable, he must show and the jury must find, that such was the understanding between the parties. Belmont Dairy Co. v. Thresher, 124 Md. 320, 92 Atl. 766.

In New Jersey, prior to the act, when one signed his name on a note followed by the word "President," nothing appearing in the body to indicate the maker, he was, *prima facie,* liable as an individual, but parol evidence was admissible both as to the original parties and as to a *bona fide* holder for value to show that the intention was to bind only the person whom the signer claimed to represent. And this rule is not altered by section 20, N. I. L. Phelps v. Weber, 84 N. J. L. 630, 87 Atl. 468.

A note reciting that "The Gymnastic Association of the north side of Milwaukee," and "we, the undersigned, promise to pay," and signed with the corporate name "by P" and others, who were its officers, but without official designation, was held to be the joint note of the corporation and of the individuals, who signed it, and parol evidence to show in what capacity the latter signed was held inadmissible. The N. I. L. was not cited. Nunnemaker v. Poss, 116 Wis. 444, 92 N. W. 375.

Defendant signed a note with his own name, adding the word "Agt." *Held,* that he was not personally liable thereon when it appeared that the payee accepted the note with knowledge that defendant was acting as agent of another and not in his individual capacity. The N. I. L. was not cited. Crandall v. Robbins, 83 App. Div. 618, 82 N. Y. Supp. 317.

In an action against an indorser of a promissory note made by a corporation, where it appears that the defendant, who was the president of the corporation, indorsed the note with his signature followed by the word "Prest.," the defendant is not concluded, under section 20, N. I. L., from denying his personal liability, and showing by parol evidence that the plaintiff acquired the note as the undertaking of the corporation making it, and had consented to, acquiesced in, and recognized the indorsement thereupon as that of the company through its president, the defendant. Birmingham Iron Foundry v. Regnery, 33 Pa. Super. Ct. 54; American Trust Co. v. Canevin, 184 Fed. Rep. 657, 107 C. C. A. 543, accord.

A husband signed a note in his own name, adding the word "agent," without more. *Held,* that he had disclosed no principal and was personally bound and that his wife, for whom he claimed to have signed as agent, was not bound on the note. Dayries v. Lindsly, 128 La. 259, 54 So. 791.

Where a note was made payable to "A, agent," and was indorsed "A, agent," without naming any principal, A was per-

sonally liable as indorser. The N. I. L. was not cited. Grange Trust Co. v. Brown, 49 Pa. Super. Ct. 274, *semble.*

The maker of a note added to his signature "Pastor of Saint Francis Church," without anything more. *Held,* that there was nothing to indicate that he signed in a representative capacity and that it was the personal note of the maker. Schumacher v. Dolan, 154 Iowa, 207, 134 N. W. 624.

A trustee under a will, without authority to borrow, executed a note as trustee as evidence of a loan, and applied the money to the use of the trust. *Held,* that, regardless of the form of the note, he was individually liable and that the estate was not. Tuttle v. First Nat. Bank of Greenfield, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420.

In Dunham v. Blood, 207 Mass. 512, 93 N. E. 804, the note was signed, "Estate of William R. Clark, by William R. Clark, Jr., Trustee." In this case also, it was held, that since the trustee was not authorized to borrow on behalf of the trust and give a note as trustee, he was individually liable, notwithstanding the form of the note.

If the payee knows the nature and object of the trust, and that the maker of the note was acting in his capacity as trustee, the maker is not individually liable to the payee, although none of such information appears on the note. Kerby v. Reugamer, 107 App. Div. 491, 95 N. Y. Supp. 408.

Where defendant signed a note as a "trustee," *held,* that as to holders in due course the principal must be disclosed on the face of the note in order to relieve defendant of personal liability (*semble*), but as between defendant and the payee the disclosure might be made *aliunde,* and is a question of fact for the jury. Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738.

A note given in settlement of an account of a church was signed by the defendants, with the addition of "Trustee" after each name. The name of the church was not disclosed in the note. *Held,* that as between the original parties section 20 is merely declaratory of the *prima facie* liability of the defendants, who could interpose any defenses allowable by section 58, and that therefore extrinsic evidence was admissible to show the intention of defendants in signing the note and of plaintiffs in receiving it. G. C. Riordan & Co. v. Thornsbury, 178 Ky. 324, 198 S. W. 920.

The effect of this decision was to reform the note, in a court of law, by treating it, as between the parties, as meaning what they intended it to mean, since it could hardly be said that the instrument was the note of one party as between the parties to it and of another party as to a holder in due course.

ENGLAND—

A note reading, "six months after demand I promise to pay," was signed "J. H. S. Laundry and Dye Works, Limited, J. H. S., Managing Director." The name of the company was stamped on the note by a rubber stamp, as were also the words "managing

director." The money borrowed was applied to company purposes and the interest was paid by the company's checks. *Held,* that this was the note of the company and that J. H. S. was not personally liable. Vaughan Williams, L. J., said: "I think that anyone reading this promissory note would at once say that it was one which made the company liable. Chapman v. Smethurst [1909], 1 K. B. 927.

A check drawn in favor of plaintiff was stamped near the top with the words "B. Marcus & Co. (Limited)" and signed by the two defendants as follows: "B. Marcus, Director, S. H. Davids, Directors, —— Secretary," the space for the signature of the secretary being left blank. The name of the company appeared only at the top of the check. Two directors had authority to sign checks on behalf of the company. The check was stated to have been drawn for goods supplied by plaintiff to the company. *Held,* that the defendants were personally liable on the check. Landes v. Marcus and Davids (K. B. Div. Mar. 31, 1909), 25 T. L. Rep. 478.

As to this case, it is to be remarked: First, that it is decided wholly on the authority of Dutton v. Marsh, L. R. 6 Q. B. 361, a case before the adoption of the Bills of Exchange Act. Second, that section 26(1), Bills of Exchange Act, cited by the court, omits the words "without disclosing his principal," which are found in section 20, Negotiable Instruments Act. Third, that it is a narrow and unbusinesslike view to hold that the words stamped at the top of the check did not indicate a principal on whose behalf defendant, by adding "Director" to their names, were signing.

Sec. 21. Signature by Procuration—Effect of.

A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

In Illinois the word "only" in the third line is omitted.

ENGLAND—

The manager of a company in order to obtain a guarantee for the company's business, without authority, gave a note signed "for myself and in representation of the company." This was not necessary or in the ordinary course of the company's business. *Held,* that the company was not liable on the note. *Re* Cunningham & Co., 36 Ch. D. 532.

An agent of a company drew a check "per proc.," in excess of his authority. The company is not liable on the check to one who cashed it in good faith, but must account for any money which came into its possession and was employed for its benefit. Reid

v. Rigby & Co. [1894], 2 Q. B. 40. See also, Bissell v. Fox, 53 L. T. R. 193, S. C. *infra,* pp. 554, 561.

Directors of a company which had no power to accept bills, accepted a bill "per proc.," the company. *Held,* that they are personally liable in an action for false representations. West London Commercial Bank v. Kitson, 13 Q. B. D. 360.

Where an agent accepts or indorses "per proc.," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority. But when the agent has the authority to do the act in question, his abuse of such authority will not affect a *bona fide* holder for value. Bryant, Powis & Bryant v. Quebec Bank [1893], A. C. 170, 179.

The effect of section 25, Bills of Exchange Act (section 21, N. I. L.), is that the principal is not liable upon the instrument, even to a holder in due course, if the agent in so signing the check has exceeded the actual limits of his authority. But, having received on deposit a check signed "per pro" a banker, who in good faith and without negligence receives payment of the check for a customer is, under section 82, B. E. A. (*infra,* p. 560), not liable to the principal, and the banker is not negligent, within the meaning of the section, merely because he does not inquire into the drawer's authority. Sections 25, B. E. A. (21 N. I. L.) and section 82, B. E. A., are distinct and have reference to different things, section 25 to rights and liabilities while a bill is current, and section 82 to rights and liabilities after it has been discharged. Morison v. London County & Westminster Bank [1914], 3 K. B. 356.

Sec. 22. Effect of Indorsement by Infant or Corporation.

The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.[1]

In North Carolina, after its original adoption in 1899 as section 22 and in the above form, the words "or married woman" were inserted after "infant" in both places, and this section was transferred to the article entitled "Indorsements" ("Negotiation" in the original statute), and became section 2180, Pell's Revisal of 1908.

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1 "Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill and to enforce it against any other party thereto." B. E. A. s. 22 (2).

AMES: The language of section 22, unlike that of the English Act, is ambiguous and may mean that the transfer of the infant is irrevocable, which would be an unjust change in the law where the indorsee knows of the infancy.

BREWSTER: The language used in section 22 means the same thing as that of the English Act.

MCKEEHAN: The section makes no change in the law. An infant's indorsement always "passes the property." The section does not touch the question of his right to revest the title in himself. The English Act provides the same thing as section 20.

Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. Supp. 355, S. C. sec. 29 (indorsement by a corporation); Willard v. Crook, 21 App. D. C. 237 (indorsement by a corporation), S. C. sec. 66.

Section 22 merely provides that the indorsement of an infant in not void and that his incapacity is not a defense in favor of prior parties, but does not take away the infant's right to disaffirm his indorsement and recover the instrument even against an innocent indorsee for value. Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917B, 1172.

Under the Infants' Relief Act, 1874, and Bills of Exchange Act, section 22, an infant can not be held on a bill of exchange, even though it was given for necessaries and is in the hands of a holder in due course. *In re* Soltykoff [1891], 1 Q. B. 413.

Sec. 23. Forged Signature—Effect of.

When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.[1]

[1] The English Act adds: "Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery." B. E. A. s. 24.

The Illinois Act omits the words "of the person whose signature it purports to be."

State v. Corning Savings Bank, 139 Iowa, 338, 115 N. W. 937; Blum v. Whipple, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553; Lonier v. State Sav. Bank, 149 Mich. 483, 112 N. W. 1119; Casey v. Pilkington, 83 N. Y. App. Div. 91, 82 N. Y. Supp. 529; Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. Supp. 561; Anglo-South Am. Bk. v. Nat. City Bank, 161 App. Div. 268, 146 N. Y. Supp. 457, S. C. sec. 189; Falconi v. Magee, 47 Pa. Super. Ct. 560; Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank, 134 Tenn. 379, 183 S. W. 1006, S. C. sec. 9-3; Figures v. Fly, 137 Tenn. 358, 193 S. W. 117, S. C. secs. 14, 25, 62; Warren v. Smith, 35 Utah, 455, 100 Pac. 1069; National City Bank v. Third National Bank, 177 Fed. Rep. 136, 100 C. C. A. 556.

"Precluded" in this section is used as synonymous with "estoppel," and does not include ratification or adoption in their strict primary meaning, but only when they involve some of the elements of estoppel. Olsgard v. Lemke, 32 N. D. 551, 156 N. W. 102.

Whether an indorsement on a note, not necessary to the plaintiff's title, is genuine or forged, is immaterial to the plaintiff's right to recover. Jett v. Standafer, 143 Ky. 787, 137 S. W. 513, S. C. sec. 27.

Proof that one of several signatures to a note was forged or affixed without authority does not necessarily avoid the note as to those whose signatures are genuine; it clearly would not render the note unenforceable against parties who actively procured the forgery or acquiesced in it on full knowledge. But *semble* that if a party signed on the faith of a forged preceding signature, and believing that he was assuming a joint liability with the one whose signature was forged, he would not be liable to the payee. Beem v. Farrell, 135 Iowa, 670, 113 N. W. 509. *Sed quaere* as to the *dictum* on the latter point, which seems clearly wrong. See Ames Cases on Suretyship, 310, 311, n. 6.

An agent having authority to indorse checks payable to his principal and to deposit them in a certain bank for collection, indorsed his principal's name and transferred the checks to a third person who deposited them in defendant's bank, which collected and paid the amount to such third person in good faith. *Held,* that the indorsement by the agent was not a forgery and the defendant was not liable to the principal for a conversion of the checks. Salen v. Bank, 110 App. Div. 636, 97 N. Y. Supp. 361; Cluett v. Couture, 140 App. Div. 830, 125 N. Y. Supp. 813, accord, affirmed without opinion, 206 N. Y. 668.

A stenographer had authority to indorse for deposit checks payable to her employer, the plaintiff, with a rubber stamp reading "Pay to the order of the Greenwich Bank, The Standard Specialty Co.," followed by the words in her handwriting "Percy

H. Pinder, Treasurer." She indorsed certain checks wholly in her own handwriting as follows: "Standard Steam Specialty Co., Percy H. Pinder, Treasurer," and also indorsed her own name thereon, negotiated them to persons, who deposited them in the defendant bank, which collected them and paid the proceeds to the depositors. Paintiff sued defendant to recover the amount of the checks. *Held,* that the indorsements were forgeries and that defendant was liable. Standard Steam Specialty Co. v. Corn Exchange Bank, 220 N. Y. 478, 116 N. E. 386.

The defendants' agent, to sell its goods and collect therefor, was provided with a rubber stamp with which to indorse checks payable to defedant. "Pay to ——— or order for exchange, payable to Swift & Co. Swift & Co., by ———." The agent used this stamp to indorse his individual checks to order of Swift & Co. with Swift & Co.'s name and they were cashed by the plaintiff indorsee. *Held,* that the agent had no apparent authority to indorse checks in that manner and the form of the stamp was sufficient to put the plaintiff on inquiry as to the actual authority of the agent. The N. I. L. was not cited on this point. Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447, S. C. secs. 71, 89, 186.

Plaintiff discounted a note executed without authority in the name of the X Association by a trustee, and gave therefor a check on defendant bank, payable to the order of the X Association. The check was presented by the trustee to defendant for certification and was certified. The trustee, without authority, and without the knowledge of the association, indorsed the check in the name of the association, and the defendant afterwards paid the check and charged it against plaintiff's account. *Held,* that no title to the check passed and that plaintiff could recover the amount from the defendant. Anglo-South American Bank v. Nat. City Bank, 161 App. Div. 268, 146 N. Y. Supp. 457, affirmed without opinion, 217 N. Y. 726, S. C. sec. 189.

A note signed by a firm name and made payable to the order of one of the members of the firm was, without the knowledge or consent of the payee, indorsed in the payee's name by another member of the firm, was discounted for the firm and the money placed to the credit of the firm. *Held,* that the payee was not liable as joint maker or as indorser. Pettyjohn v. Nat. Exchange Bank, 101 Va. 111, 43 S. E. 203.

A traveler's check was issued by the defendants to the plaintiff in the following form:

"K. N. & K. Traveler's Check Nos. S 4, 021-01, $100.00.
Sold by Lyon County Bank,
New York (date), Yerington, Nevada.

Holder's Signature.

"Good within one year from date when countersigned below with the opposite signature. James Sullivan.

"K., N. & K., New York, through their correspondents, will pay against this check out of their balance to the order of T. P. Bingham é Hijos one hundred dollars or equivalent as follows, etc.

Signed,
K., N. & K.

Countersign here:
This signature must correspond with above. * * * "

This check was lost by the plaintiff and subsequently the name of the plaintiff forged under the words "countersign here, etc.," The check was then indorsed by the payees and passed through various banks and was finally paid by the defendant. *Held,* that the defendants were liable to the plaintiff for the amount of the check and that a provision requiring an indemnity bond before recovery in the case of loss of checks was not applicable. The report in the Court of Appeals seems to indicate that the name of the payee was written in the check at the time it was issued, but it would appear from the report in the case in 81 Misc. Rep. 148, 142 N. Y. Supp. 307, that the check was issued with a blank for the name of the payee and the name of the payee must therefore have been inserted subsequently. The N. I. L. was not cited in this case. Sullivan v. Knauth, 220 N. Y. 216, 115 N. E. 460, L. R. A. 1917F, 554.

In 27 Harvard Law Rev. 678, it is suggested that if the payee of such checks is negligent in failing to make known the loss of the checks to the bankers he ought to lose, because, although such is not the law as to ordinary checks, forgery of the traveler's name is made easier in the case of such traveler's checks because the traveler's signature is already on the checks.

Defendant cashed a number of drafts and checks, payable to the plaintiff's order, on a forged indorsement of plaintiff's name by plaintiff's bookkeeper, who appropriated the money to his own use. *Held,* that plaintiff could recover the amount of the drafts and checks from defendant and that negligence of plaintiff in not examining the bookkeeper's books or accounts was no defense. The N. I. L. was not cited. Hamlins Wizard Oil Co. v. U. S. Express Co., 265 Ill. 156, 106 N. E. 623.

Plaintiff, holding a check under the forged signature of the payee, deposited the same in the defendant bank, which collected the same from the drawee bank, but upon discovery of the forgery, repaid the amount to the drawee. Plaintiff sued the defendant. *Held,* that defendant was not bound to await suit before making repayment to the drawee and that plaintiff could not recover. Geering v. Metropolitan Bank, 169 App. Div. 927, 156 N. Y. Supp. 582.

Plaintiff held a check under a forged indorsement of the name of the payee, deposited it in the defendant bank for collection and was credited with the amount and sued defendant therefor. *Held,* that the burden was on the plaintiff to prove that the check had not been collected or that the defendant was negligent in

failing to collect. Also *semble*, that, even if the defendant bank had collected the check, plaintiff would not have been entitled to the proceeds, since they would have belonged to the payee whose name had been forged. Stein v. Empire Trust Co., 148 App. Div. 850, 133 N. Y. Supp. 517.

In National Bank of Commerce v. First Nat. Bank of Coweta (Okla.), 152 Pac. 596, it was held that the drawee bank could not recover from defendant money paid on a check held by defendant under a forged indorsement of the payee's name because the bank had negligently failed to observe the drawer's direction not to pay the check.

It is submitted that this is a misapplication of section 23 on which the court relied. That section relates only to rights to retain the instrument or to give a discharge therefore or to enforce payment thereof against a party thereto. The plaintiff was not seeking to enforce a right on the instrument. The court seemed to think that plaintiff's right to recover rested on sections 65 and 66. But those sections do not relate to the indorsement of one presenting for payment but only to an indorsement for transfer to a purchaser. One who indorses in presenting for payment is not a warrantor and makes no promise. His indorsement is simply a receipt.[1] So the right of the drawee is the right which the common law gives him. Again, even assuming that sections 65 and 66 give the only right to recover in such a case, how was the drawee precluded in this case from setting up the payment of money on mistake of fact. There could be no estoppel in the absence of evidence that the defendant had changed his position by reason of the negligence of the drawee in failing to regard the direction of the drawer. Moreover, negligence on the part of the payor is not generally a bar to the recovery of money paid under a mistake.[2]

The defendants' indorsements having been forged upon notes by the maker, the defendants at the request of the holder after the negotiation of the notes and without consideration, indorsed the following guaranty upon the notes: "We severally and jointly guarantee the indorsements on the within note to be correct and jointly and severally guarantee the payment of the same when due." *Held*, that the defendants are not liable to the holder, who had not changed its position in reliance on the guaranty. The N. I. L. was not cited. Catskill Nat. Bank v. Lasher, 84 Misc. Rep. 523, 147 N. Y. Supp. 641.

The payment by defendant of certain notes to which his name was forged to save the forger from disgrace, does not render defendant liable upon other notes to which his name was forged, where plaintiff had no knowledge that defendant had paid forged

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[1] See 17 Harvard Law Rev. 581, 582; Brannan's Negotiable Instruments Law, 2d Ed. 83-84.

[2] Kelly v. Solari, 9 M. & W. 54; Appleton Bank v. McGilway, 4 Gray 518.

notes. The N. I. L. was not cited. Murphy v. Estate of Skinner, 160 Wis. 554, 152 N. W. 172.

Defendant bank paid a check on the forged indorsement of the payee's name. *Held,* that the plaintiff, the drawer, was not estopped because the forger was the agent of the plaintiff, to whom the check was intrusted for delivery, although the agent had forged the name of the payee on previous checks, the plaintiff being ignorant of such prior forgeries. Grand Lodge v. State Bank, 92 Kan. 876, 142 Pac. 974, L. R. A. 1915B, 815.

An instruction was erroneous, that the defendant was liable on certain checks, if his signature thereto was obtained without his knowledge or consent, but by a deception practiced on him by placing carbon paper between some papers to which he knowingly affixed his signature and the checks thereunder. A signature thus obtained, is a forgery, not binding on defendant, unless he was guilty of negligence precluding him from setting up the forgery, which question should have been submitted to the jury. Maurmair v. Nat. Bank of Commerce (Okla.), 158 Pac. 349.

Defendant executed to complainant a mortgage to secure a note payable to complainant to which defendant's signature had been forged by her son-in-law. The complainant thereafter released and surrendered to the son-in-law his stock of goods, which had previously been assigned in trust for complainant's benefit. *Held,* that defendant was precluded from setting up the forgery of her signature to the note. Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S. W. 723.

Before a note was delivered to and accepted by the payee, the defendant, whose name appeared upon the back, being shown the note, said, "Everything is all right." When sued by an indorsee the defendant claimed that the signature was a forgery, and so testified. Motions for a nonsuit and for a verdict for the defendant were overruled. *Held,* that since the evidence tended to show that the language and conduct of the defendant was calculated to induce the plaintiff to believe that the indorsement was genuine, and that the plaintiff acted on such belief to his damage, the motions were properly denied. Gluckman v. Darling, 85 N. J. L. 457, 89 Atl. 1016. The report does not show the evidence referred to by the court.

An answer denying defendant's signature to a note puts on plaintiff the burden of establishing that the note was signed by defendant or that the signature was ratified by him. The burden of evidence, as well as the burden of proof, begins, continues and ends with the proponent of the proposition that the signature is genuine. An instruction that if defendant did not sign the note he should have judgment, is not erroneous, because it did not also require the jury to find that the signature was affixed without the authority of defendant. German-American Bank v. Barnes (Mo. App.), 185 S. W. 1194, S. C. sec. 59.

A stranger, giving the name of J. C., attempted to negotiate to plaintiff bank a draft on a New York bank for $500, payable to one J. C. Upon the refusal of the plaintiff, the defendant, although

warned by plaintiff, bought the draft, indorsed it, left it with plaintiff for collection, was credited with the amount, and paid the stranger $125. Plaintiff sent the draft to New York for collection, was advised that it had been paid, and so notified defendant, who thereupon bought of plaintiff a draft for $375, payable to J. C., and sent it to him. Later plaintiff learned that the indorsement on the draft for $500 was forged. A *bona fide* holder of the draft for $375 sued plaintiff and recovered judgment (Jamieson v. Heim, 43 Wash. 153, *supra*), which plaintiff paid, and thereupon sued defendant for $375. *Held,* that plaintiff could recover. The N. I. L. was not cited. Heim v. Neubert, 48 Wash. 587, 94 Pac. 104.

Plaintiff drew a check to the order of Max Roth, who did business, as plaintiff knew, at 48 Walker Street, New York City, but by mistake mailed it to "Max Roth, 48 Walker Street, Cleveland, Ohio," where the letter carrier found no one of that name on Walker Street, but found one on Henry Street, and gave him the letter. He indorsed the check, transferred it for cash to another, who collected it from the drawee bank. In an action by plaintiff against the drawee bank. *Held,* not citing the N. I. L. nor any authorities, that plaintiff could not recover. Weisberger Co. v. Barberton Savings Bank, 84 Ohio St. 21, 95 N. E. 379, 34 L. R. A. (N.S.) 1101. The case is distinguishable from Mead v. Young, 4 T. Rep. 48, and Rossi v. Nat. Bank, 71 Mo. App. 150, if at all, only on the ground that plaintiff was negligent and should therefore stand the loss. *Sed quaere,* since the wrong M. R. was not found at the erroneous address but at another place where the carrier was not authorized by the address on the envelope to deliver the letter.

Again, negligence of the drawer of a check in permitting the check to get into the hands of a person not the payee, does not make the drawer liable to one who takes the check on a forged indorsement of the payee's name. Miners' & Merchants' Bank v. St. Louis Smelting, etc., Co. (Mo. App.), 178 S. W. 211. And an indorsement with intent to defraud by one who has the same name is a forgery. Beattie v. Nat. Bank, 174 Ill. 571, 51 N. E. 602, and cases cited.

ENGLAND—

A bill payable to a real person not intended by the drawer to have any interest in it, is payable to a fictitious person, and is therefore to be treated as payable to bearer, under section 7, subsection 3 (*supra,* p. 31, n. 2), and payment of it in due course by the acceptor's banker is binding on the acceptor. Bank of England v. Vagliano [1891], A. C. 107, S. C. sec. 9-3.

A check on a London bank drawn in Roumania was transferrred by a forged indorsement in Austria, where such transfer gave a good title. *Held,* that the validity of the transfer is to be governed by the law of Austria, section 24, B. E. A., being only declaratory of English law and not controlling the general rule of international law. Embiricos v. Anglo-Austrian Bank [1905], 1 K. B. 677.

A, fraudulently representing himself to be B, obtained a check payable to the order of B, who was known to the drawer to be an existing person. *Held,* that an indorsement of the check by A in the name of B passes no title under section 23, or at common law, and the drawer can recover from the drawee bank which paid the check. Tolman v. American Exch. Bank, 22 R. I. 462, 48 Atl. 480. *Sed quaere?* The cases are overwhelmingly to the contrary as to the common law, and the cases cited by the court are not in point. And the contrary construction is put upon section 23, N. I. L., in Hoffman v. American Exchange Bank, 2 Neb. (unofficial) 217, 96 N. W. 112. The contrary result was also reached in Jamieson v. Heim, 43 Wash. 153, 86 Pac. 165, in Heavey v. Commercial Nat. Bank, 27 Utah, 222, 75 Pac. 727, 101 Am. St. Rep. 966, and in Central Nat. Bank v. Nat. Met. Bank (C. C. Dist. Col.), 35 Wash. Law Rep. 621, in which jurisdictions the N. I. L. was in force, although section 23 was not cited.

In Boatsman v. Stockmen's Nat. Bank, 56 Colo. 495, 138 Pac. 764, 50 L. R. A. (N. S.) 107, a well-reasoned case, plaintiff remitted money to defendant bank and directed it to be paid for a deed of land belonging to one Murphy, but which plaintiff had bought from one Warren through negotiations by letter, Warren, pretending to be Murphy, and plaintiff believing him to be Murphy. Warren, posing as Murphy, presented the deed to defendant, and the bank, believing him to be Murphy, paid the money to him and received the deed for plaintiff. It was held, that the bank carried out the intent of plaintiff, who mistook his physical payee Warren for his mental payee Murphy. The true Murphy being unknown to him, he meant the money to be paid to the person with whom he was dealing and that therefore the plaintiff, not the bank, must bear the loss. The N. I. L. was not cited.

The plaintiff gave a check to a stranger who was introduced to him as X, the owner of certain land, in exchange for a note and mortgage executed by the stranger, who was an imposter, in the name of X. The defendant, the drawee bank, paid the check after it had been endorsed by the stranger in the name of X. *Held,* that the plaintiff intended X, the person with whom he dealt, to be the payee of the check, and that he can not recover of the bank, which charged the amount to his account. The N. I. L. was not cited. McHenry v. National Bank, 85 Ohio St. 203, 97 N. E. 395, 38 L. R. A. (N. S.) 1111n.

A swindler writing from Ft. Worth, Texas, signing himself as A. W. Hudson and fraudulently representing that his wife was one Olive Hudson, who actually owned certain real estate in Denver, managed after correspondence with an agent for one Mrs. Bosworth to secure a loan on a mortgage of the Denver real estate. A note and mortgage were sent by the agent to the supposed Hudson for execution. Thereafter the defendant bank received from Ft. Worth a letter signed A. W. Hudson enclosing a note and mortgage purporting to be signed by him and Olive Hudson with instructions to give the note and mortgage to Mrs. Bosworth,

to collect $2,500 from her and remit. Mrs. Bosworth paid the money into the bank and took the note and mortgage. The bank followed the instructions in Hudson's letter, made a draft payable to the order of A. W. Hudson and mailed it to him at Ft. Worth. The draft was endorsed in the name of Hudson. *Held,* that it was the intent of Mrs. Bosworth that the person at Ft. Worth calling himself A. W. Hudson should be the payee and that by his endorsement the title passed. First Nat. Bank v. American Exchange Nat. Bank, 49 App. Div. 39, 63 N. Y. Supp. 58. The case is reviewed in 14 Harvard Law Rev. 60.

The judgment was affirmed in the Court of Appeals, but that court held that the intent of Mrs. Bosworth did not control, but the intent of the bank, and that the bank intended the payee of the draft to be the person from whom it had received the note and mortgage and instructions to remit the money. And that, therefore, the endorsement by that person in the name of A. W. Hudson passed the title. First Nat. Bank v. American Exchange Nat. Bank, 170 N. Y. 88, 62 N. E. 1089.

Plaintiff gave his check payable to J. L. B. for horses bought of one S. who falsely represented that the horses were owned by a certain J. L. B. The check was delivered by S. to another J. L. B. who was really the owner of the horses, indorsed by him, and paid by the drawee bank. Plaintiff being dissatisfied with the horses sued the drawee bank. *Held,* plaintiff could not recover. He intended to make the check payable to the owner of the horses and his indorsement passed the title. Sherman v. Corn Exchange Bank, 91 App. Div. 84, 86 N. Y. Supp. 341.

A bank is not liable for the payment of a draft on a forged indorsement, where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. In such a case the fact that the fraud was accomplished by prior correspondence to which the purchaser of the draft gave credence, does not remove the case from the rule.

An executor received letters purporting to be signed by a legatee. As a matter of fact the legatee was dead, and the letters were written and signed by her husband. The executor bought a draft for the amount of the legacy to the order of the legatee, and sent it in a letter addressed to the legatee. The husband forged the name of his deceased wife, and secured the money. *Held,* that the executor had no right of recovery against the bank which had paid the draft. States v. First National Bank, 17 Pa. Super. Ct. 256. The draft was before the N. I. L.

This case was afterward affirmed by the Superior Court in 203 Pa. 69, 52 Atl. 13, but solely on the ground that the executor waited nearly four years after he discovered the fraud before notifying the bank of the forgery. The court said that the lower court seems to have decided the case on the authority of Land Title & Trust Co. v. Northwestern Bank, 196 Pa. 230, *infra,* p. 90, but

that the facts in the two cases are clearly distinguishable, but in what respect the court did not state.

In Simpson v. Denver & Rio Grande R. Co., 43 Utah, 105, 134 Pac. 883, 46 L. R. A. (N. S.) 1164, checks payable to employes of defendant railroad company, signed by the treasurer and to be paid by the treasurer and countersigned by the paymaster, were taken by the paymaster with a pay roll of the employes, to be delivered to them as they passed through the pay car. As each one appeared his name was checked on the roll and his check given to him. There was an engineer named "X." Another person appeared and gave the name of "X," and the paymaster gave him the check payable to "X," which was indorsed by the impersonator to plaintiff, a holder in due course, who upon refusal of the treasurer to pay the check, sued the defendant. *Held*, that he could not recover. No case since the N. I. L. was cited, except Tolman v. American Nat. Bank, *supra*, p. 87, and the court distinguished the many cases before the act on the ground that in those cases the instrument was delivered to the very person whom the drawer intended. This seems enough to distinguish the case. The intent of the treasurer who drew the check was to make X the payee and, although the counter-signature of the paymaster was required, the duty and authority of the paymaster was to delivery only to X. Only in this way can the case be distinguished from Heavey v. Commercial Nat. Bank, 27 Utah, 222, 75 Pac. 727, *supra*, p. 87, which was not referred to by the court, in which case a bank by postal card mistakenly informed the wrong person but of the same name, that money had been deposited to his credit in the bank. This person wrote to the bank for a draft, which the bank sent to him, and which he indorsed to a holder in due course, who was held to have a good title.

Plaintiff, a private banker, received a letter written by an imposter, but signed with the name of an army officer, whose name was on the army list, in which letter the plaintiff was asked to discount pay vouchers. The plaintiff assented and pay vouchers, which were forged, were received by the plaintiff, who mailed a letter to the supposed officer, addressing him by name and adding his official title, "Lt. Col. Coast Artillery Corps," and enclosing a check made payable in the same manner. This check was endorsed by the imposter in the name of the payee and, passing through other banks, was finally paid by the defendant, the drawee bank, and charged to the account of the plaintiff. *Held*, that the designation of the payee by his official title distinguished the case from other cases of fraudulent impersonation, and that the drawee bank was not entitled to charge the drawer's account. Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N. Y. Supp. 1017, affirmed without report, 210 N. Y. 567.

In these fraudulent impersonation cases, the maker or drawer of the instrument may be said to have a double intent. First, he intends to make the instrument payable to the person before

him or to the person writing at the other end of the line, in case the negotiation is by correspondence. Second, he intends to make the instrument payable to the person whom he believes the stranger to be. The courts have almost unanimously held that the first is the controlling intent except where the named payee was already known to the maker or drawer, as in Cundy v. Lindsay, 3 A. C. 459, and Rossi v. Nat. Bank, 71 Mo. App. 150, *supra*, p. 86, or was more particularly identified in some manner, *e. g.*, by some designation, description or title as in the case of Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N. Y. Supp. 1017, *supra*, p. 89, in which cases the courts treat the second as the controlling intent.

For full discussion of this subject by Professor Ames, Judge Brewster and Mr. McKeehan, see *infra*, pp. 468-471, 498-504.

The principle of these cases is adopted in Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N. Y. Supp. 387. But query, whether the principle was correctly applied? The case is really one of fictitious payee, not known to the drawer to be such, as was stated in the opinion of the two dissenting judges. It is like the case of Jordan Marsh Co. v. National Shawmut Bank, *supra*, p. 33, and other cases cited under section 9-3, *supra*, and ought to have been decided in the same way. But the judgment was affirmed by the Court of Appeals in 215 N. Y. 726, 109 N. E. 1077, on the opinion of Scott, J., below.

See also an elaborate note in 50 L. R. A. 75 to the case of Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 Atl. 420, affirmed after second trial, 211 Pa. 211, 60 Atl. 723, in which case a check payable to X was given by the drawer to one who falsely represented himself to be X, the owner of certain land, in return for a mortgage on the land, forged by the imposter in the name of X. The check was endorsed by the imposter in the name of X and collected through the defendant bank. It was held, the drawer could not recover from the defendant. The instrument in this case was made before the adoption of the Negotiable Instruments Law in the state, but the judgment is in accord with the great majority of the cases, both before and since the act.

A was a depositor in a savings bank. B stole the deposit book and representing himself as A, asked for the amount of the deposit. The bank not being certain of B's identity by way of precaution gave him a check payable to the order of its teller who indorsed the check to A and gave it to B. B, being identified as A, got the plaintiff to cash the check. Plaintiff deposited it with the X bank which obtained payment from the drawee bank, but upon the forgery being discovered, the drawee bank recovered the money from the X bank and the latter recovered from the plaintiff who brought an action in tort for negligence against the savings bank. *Held*, that the plaintiff could not recover. Gallo v. Brooklyn Savings Bank, 199 N. Y. 222, 92 N. E. 633.

ARTICLE II.

CONSIDERATION.

Sec. 24. Presumption of Consideration.

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration;[1] and every person whose signature appears thereon to have become a party thereto for value.

By permission of Professor Williston, the following observations on the provisions of this chapter are quoted from his forthcoming work on the Law of Contract:

"SEC. 108. *The promises in negotiable paper require consideration between the promisor and his immediate promisee.*—The rule of the common law was well settled prior to the enactment of the Negotiable Instruments Law in accordance with the statement at the head of this section, so that a drawer or maker was not liable to the payee if he proved that the instrument was given without consideration. * * * Nor was an endorser liable to his immediate indorsee, nor either drawer, maker or indorser, even to a remote holder who was neither himself a holder for value, nor a successor to the rights of such a holder, except in the case of an acceptor whose promise even though made subsequent to the plaintiff's acquisition of the instrument is regarded as supported by the consideration received by the drawer. The Negotiable Instruments Law, section 24-28, was doubtless intended to codify the common law on the subject, and in the main unquestionably does so. There are, however, distinctions both at common law and under the statute between negotiable paper and ordinary simple written contracts with reference to consideration even as between immediate parties. In the first place 'every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value,' though when evidence is introduced tending to show that no consideration was given, some courts hold that the ultimate burden of establishing its existence is upon the holder. There are, however, contrary decisions and under sections 24 and 28 of the Negotiable Instruments Law it seems clear that whatever the law may have been previously, the

[1] Not in B. E. A., but section 30 (1) reads as follows: "Every party whose signature appears on the bill is *prima facie* deemed to have become a party thereto for value."

burden is now thrown upon the defendant not only of introducing some evidence of lack of consideration, but of ultimately establishing such lack by a preponderance of evidence. Further, though any consideration sufficient to support a simple contract is also sufficient for a promise on a negotiable instrument, some things are sufficient to support a promise on negotiable paper which are not sufficient consideration for other promises. Thus an ordinary oral or written promise to pay an antecedent debt does not create a new obligation; but a negotiable instrument is unquestionably sufficiently supported by an agreement to receive it in discharge of an antecedent debt. Whether an instrument, or a signature on an instrument, given to secure an antecedent debt of a third party where the creditor makes no agreement to extend or discharge the indebtedness or to forbear action upon it is not clear under the statute. If under the statute such an instrument or signature is binding, the law to that extent has been changed; for prior to the enactment of the statute it was clear that after a negotiable instrument had been delivered for sufficient consideration, one who subsequently signed was not liable without new consideration. Another possible distinction from ordinary simple contracts should be observed. Whatever may be the rule in regard to such contracts as to the person from whom consideration must move, there is no doubt that an obligation upon a negotiable instrument may be supported by consideration received by the obligor from some one other than the obligee, as well as by consideration furnished to some one other than the obligor."

"SEC. 1146. *Consideration and value.*—In this and the following sections the statute includes with identical treatment two questions not previously regarded as identical by the common law:

"(1) How far consideration is necessary to support the several promises on negotiable instruments; and when consideration is necessary, what is its essence?

"(2) What 'value' must be given by the transferee of an instrument in order to constitute him a purchaser for value, or holder in due course? The law prior to the statute was perfectly clear in regard to the first question. Between immediate parties the same kind of consideration was necessary as is essential to support any contractual promise. On the second question, however, the law was in conflict as will appear from the comment on the following section (section 25) of the statute. * * * An obvious purpose of this section was to settle the conflict of decisions in regard to the value essential to constitute a transferee a purchaser for value or holder in due course. Prior to the enactment of the statute it was held in New York that one to whom negotiable paper was transferred either in payment or as security for an antecedent debt was not a purchaser for value; and a minority of states followed this rule, especially where the instrument was given only for security The statute clearly adopts the rule of the greater number of courts prior to its enactment so far as concerns the discharge of an antecedent debt, and though it is

not clearly stated that taking as security for an antecedent debt is also giving value where neither extension nor forbearance is promised by the creditor, the decisions under the statute seem to treat a transferee as giving value regardless of whether he takes the instrument in payment or as security for an antecedent debt. If, however, the same rule is to be applied to the enforcement of the promises between immediate parties to an instrument a note given as security for the unmatured debt of another, or an indorsement on the unmatured note of another after its discount by the holder is supported by sufficient consideration—a result certainly at variance with the law as it existed before the enactment of the statute. Whether the courts will accept this conclusion is not yet clear. * * *

"Whatever may ultimately be decided where the creditor merely accepts an instrument or signature as security, his agreement to forbear or to extend the time of payment of the debt of another is unquestionably sufficient consideration to support a promise on a negotiable instrument, as indeed it would be sufficient to support an informal promise, and if the claim in question has matured, it is often possible to find facts warranting an implication of a promise of extension or forbearance."

Lynchburg Milling Co. v. Nat. Exch. Bank, 109 Va. 639, 64 S. E. 980; Hamilton v. Diefenderfer, 21 Wyo. 266, 131 Pac. 37; American Automobile Co. v. Perkins, 83 Conn. 520, 77 Atl. 954; Zimbleman & Otis v. Finnegan, 141 Iowa, 358, 118 N. W. 312; Hawkins v. Windhorst, 82 Kan. 522, 108 Pac. 805; Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; McCormack v. Williams, 88 N. J. L. 170, 95 Atl. 978, S. C. sec. 28; Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059, S. C. sec. 184; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 28, 133; Moak v. Stevens, 45 Misc. Rep. 147, 91 N. Y. Supp. 903; Royal Bank v. Goldschmidt, 51 Misc. Rep. 622, 101 N. Y. Supp. 101, S. C. sec. 119; Fassett v. Boswell, 59 Ore. 288, 117 Pac. 302.

This section has no application to non-negotiable instruments. And such instruments do not now import a consideration, the former statute importing a consideration having been repealed by the N. I. L. Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459; Kinsella v. Lockwood, 79 Misc. Rep. 619, 140 N. Y. Supp. 513.

Plaintiff, payee, is not entitled to a judgment on the pleadings where the answer alleges that there was no consideration for the note. Du Bosque v. Munroe, 168 App. Div. 821, 154 N. Y. Supp. 462.

Directors of a bank upon examination of its loans found a note signed by the cashier and payable to defendant but unindorsed.

The cashier stated that defendant had agreed to indorse the note, and, defendant having been called in, indorsed the note. *Held,* that defendant was liable although he received no consideration. Bank of Monticello v. Dooly, 113 Wis. 590, 89 N .W. 490.

A consideration moving to one of several joint makers of a note, is good as to all. The N. I. L. was not cited. First Nat. Bank of Scribner v. Golder, 89 Neb. 377, 131 N. W. 600.

Under this section a guaranty indorsed on a note and signed by the guarantor is valid, notwithstanding a statute which requires an agreement to answer for the debt, default or miscarriage of another to be in writing, expressing the consideration. First Nat. Bank v. Hawkins, 73 Ore. 186, 144 Pac. 131.

This section does not validate a note made by a married woman for accommodation where a statute prohibits her from becoming a surety or agreeing to answer for the default or liability of any other person. People's Nat. Bank v. Schepflin, 73 N. J. Law 29, 62 Atl. 333.

Defendant signed a note to take up another note given by her husband, since deceased, as accommodation maker, and by her son. *Held,* that either the waiver of the holders' claim against the estate of the husband or the discharge of the claim against the son constituted a sufficient consideration. Becker v. Noegel, 165 Wis. 73, 160 N. W. 1055. A note made on Sunday is void and ineffectual to discharge an indebtedness. *Ib.*

The president of a corporation signed a note in the name of the corporation payable to his own order, and indorsed it to the plaintiff for his personal debt. *Held,* that it would be presumed, in the absence of evidence to the contrary, that the note was issued to the president for valuable consideration. Bear Creek Lumber Co. v. Second Nat. Bank, 120 Md. 566, 87 Atl. 1084.

In Louisiana, by statute in 1868, bills of lading are negotiable by indorsement in blank or by special indorsement in the same manner and to the same extent as bills of exchange and promissory notes. Under the Negotiable Instruments Law, adopted in 1904, it therefore follows that a bill of lading may be transferred for an antecedent or pre-existing debt or for any consideration sufficient to support a simple contract. The court cited only section 24, but section 25 seems to be more appropriate. Scheuerman v. Monarch Fruit Co., 122 La. 55, 48 So. 647.

The maker of a note is not concerned with the consideration for the assignment (indorsement) of it. He is protected by the judgment against him from further suit on the note. Asiatic Tunnel Co. v. Stephenson (Colo.), 165 Pac. 773.

A note given in renewal of a previous note which was without consideration is also without consideration. Seager v. Drayton, 217 Mass. 571, 105 N. E. 461; Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436 n; Hurley v. Wilky, 18 Ariz. 45, 156 Pac. 83, not citing the N. I. L.

If a note is without consideration, a renewal thereof, although extending the time of payment, is also without consideration, and

evidence bearing on want of consideration of the original note tending to establish fraud in its inception is admissible. The N. I. L. was not cited. City Nat. Bank v. Mason (Iowa), 165 N. W. 103.

The presumption of consideration may be overcome by a finding that the maker was under the dominion of another. Maginnis v. McChesney, 179 Iowa, 563, 160 N. W. 50.

The omission of the words "for value received" does not weaken the presumption of valuable consideration. McLeod v. Hunter, 29 Misc. Rep. 558, 61 N. Y. Supp. 73.

But the words "value received" in such an instrument is an acknowledgment of the receipt of a sufficient consideration. Owens v. Blackburn, 161 N. Y. App. Div. 827, 146 N. Y. Supp. 966; Du Bosque v. Munroe, 168 App. Div. 821, 154 N. Y. Supp. 462; Hamilton v. Hamilton, 127 N. Y. App. Div. 871, 112 N. Y. Supp. 10.

The cashier of defendant bank at the request of a depositor drew checks on another bank payable to plaintiff to whom they were delivered. Defendant stopped payment at the request of the depositor. *Held,* that it is to be presumed that there was consideration moving from the depositor to defendant though there was no evidence thereof, and that want of consideration moving from the payee to defendant was immaterial. Bobrick v. Second Nat. Bank, 175 App. Div. 550, 162 N. Y. Supp. 147.

If the making of a note is alleged, neither delivery or consideration need be alleged. First Nat. Bank v. Stallo, 160 App. Div. 702, 145 N. Y. Supp. 747. Abrahamson v. Steele, 176 App. Div. 865, 163 N. Y. Supp. 827.

Burden of proof of consideration.—In an action against an indorser, defendant pleaded that he indorsed without consideration, and gave evidence to show that he indorsed without consideration for the accommodation of plaintiff. *Held,* that although the production of the note was *prima facie* evidence of consideration, the burden of proof was on the plaintiff throughout the trial. Lombard v. Byrne, 194 Mass. 236, 80 N. E. 489; Seager v. Drayton, 217 Mass. 571, 105 N. E. 461; Conners Bros. v. Sullivan, 220 Mass. 600, 108 N. E. 503, accord. Neither section 24 nor section 28 were cited in these Massachusetts cases.

Where the maker pleads want of consideration, plaintiff (payee) may recover in the absence of evidence in support of the plea. But if defendant give evidence tending to show want of consideration the burden is on the plaintiff to show by a fair preponderance of evidence upon the whole case that there was consideration. Bringman v. Van Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845, *semble;* Hardinge v. U. S. Zinc Co., 171 App. Div. 742, 157 N. Y. Supp. 852; Abrahamson v. Steele, 176 App. Div. 865, 163 N. Y. Supp. 827; Spencer & Co. v. Brown, 143 N. Y. Supp. 994. The foregoing New York cases cite section 24, N. I. L., but not section 28. First Nat. Bank v. Paff, 240 Pa. 513, 87 Atl. 841, not citing the N. I. L.; Holbert v. Weber, 36 N. D. 106, 161 N. W. 560, not citing the N. I. L., accord; Hudson v. Moon, 42 Utah, 377, 130 Pac. 774, accord, not citing section 28.

Where the defense is that a note was without valuable consideration, the plaintiff has the affirmative of the issue, and the burden of proof rests upon him at every step of the case to show a consideration by a preponderance of the whole evidence adduced at the trial. The N. I. L. was not cited. Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, 135 Am. St. Rep. 761, 18 Ann. Cas. 204.

In most of the foregoing cases on the question of burden of proof, the N. I. L. was not cited; the only cases cited were those decided prior to the adoption of the N. I. L., and the judgments rest on the prior law of the state, which was contrary to the correct rule of pleading and to the rule in the majority of the states. Moreover, the courts, in all these cases, seem to have overlooked section 28, N. I. L., which makes absence of consideration "matter of defense" against anyone not a holder in due course.

The only case found on this side of the question which does refer to section 28 is Bank of Gresham v. Welch, 76 Ore. 272, 147 Pac. 534, in which case the court said, that "under the statute the burden of showing that there was a want of consideration rests upon the defendant, and, if he offers any evidence that shows or tends to show a want of consideration, then it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence upon the whole case that there was a consideration." In support of this proposition, the court cited only Bringman v. Van Glahn, *supra*, in which, as was pointed out, no reference was made to section 28. The court then said "absence or failure of consideration is a matter of defense as against any person not a holder in due course as ordained by section 28." Nothing further was said by the court about section 28. Section 28 seems thus to have been thrown in generally without any attempt to discuss it or to show its application.

Opposed to the foregoing cases are the following, decided since the adoption of the N. I. L. The burden is on the maker of a note to show want of consideration. Columbian Conservatory v. Dickenson, 158 N. C. 207, 73 S. E. 990. In an action on a check the burden is on the estate of the drawer to plead and prove lack of consideration. Harney v. Lee, 175 Ill. App. 250. "The burden is upon him (defendant) to show want of consideration in support of his affirmative plea to that effect." Brokaw v. McElvoy, 162 Iowa, 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 841.

Fraud and want of consideration are affirmative defenses, which must be established by clear and convincing proof. Harley v. Wilky, 18 Ariz. 45, 156 Pac. 83.

The burden of proof rests on the defendant who pleads want of "adequate consideration." Teutonia Bank & Trust Co. v. Buhler, 137 La. 5, 68 So. 194.

In George J. Cooke Co. v. Pisano, 174 Ill. App. 609, a charge was sustained "that the jury should find the issues for the plaintiff if they believed from the preponderance of the evidence that the note sued upon was executed or delivered for a valuable con-

sideration, and also that the burden of proving that the note was without consideration was upon the defendant."

In the foregoing six cases the N. I. L. was not cited, but in the following cases it was. Under this section (section 24) the burden of proof is on the defendant who alleges want of consideration. *In re* Estate of Chismore, 175 Iowa, 495, 496, 157 N. W. 139, 140. The presumption of consideration attaches to a promissory note under this section (section 24) and the burden of proving no consideration is on the defendant so asserting. First Presbyterian Church v. Dennis, 178 Iowa, 1352, 161 N. W. 183, L. R. A. 1917C, 1005; Joveshof v. Rockey, 58 Misc. Rep. 559, 109 N. Y. Supp. 818, S. C. sec. 59.

Under this section (section 24) the burden is on an indorser of a note to show that his indorsement was without consideration and for the accommodation of the payee. State Bank v. Morrison, 85 Wash. 182, 147 Pac. 875.

In Piner v. Brittain, 165 N. C. 401, 81 S. E. 462, section 28 was quoted in full and the court said: "As to matter of a defense, the burden of proof rests on the defendant who asserts it," and a charge was sustained "that the defendant must show by the *greater weight* of the evidence that the note was signed by him without valuable consideration."

In Shaffer v. Bond, 129 Md. 648, 99 Atl. 973, it was held, that in an action on a note the defense of want or failure of consideration is an affirmative defense and the burden of proof rests on the defendant to the end of the case. The question is fully discussed in this case. The court cited sections 24 and 28 and reviewed many cases, both before and since the statute. The court also considered the question from the point of view of mercantile convenience and pointed out that notes are often taken in order to settle questions about the amount of liability, etc., and to put them in such shape as to speak for themselves in case of death of either party, yet if the burden is on the payee to sustain the consideration such notes are of little more use than an open account would be. And the creditor relying on the note, may have destroyed checks and other evidence tending to prove the consideration.

It seems, indeed, strange, that in so many cases decided from five to twenty years after the Negotiable Instruments Law went into effect no reference should be made to the act or to the sections especially affecting a question upon which there had been such a conflict of opinion in the United States.

It is difficult to believe that if the courts, which held the contrary, had had section 28 before them and had considered it, they could have failed to see that that section puts the burden of establishing want of consideration on the defendant or the party asserting it. As was said by the North Carolina court, in Piner v. Brittain, *supra*, "As to matter of defense, the burden of proof rests on the defendant who asserts it." It is also to be noted that section 28 puts absence of consideration and failure of considera-

tion on the same footing, and that as to the latter, it has generally been considered as a matter of defense, the burden of establishing which is on the one asserting it.[1] See also, cases *infra,* under section 28. As to the rule in an action by an indorsee, see Mitchell v. Baldwin, *infra,* section 59.

Sec. 25. Consideration—What Constitutes.

Value is any consideration sufficient to support a simple contract.(*a*) An antecedent or pre-existing debt[2] constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.(*b*)

The Wisconsin Act interpolates "discharged, extinguished or extended" after the word "debt" in line three, and adds to the section the following sentence: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery by the maker, does not constitute value."

In Illinois the words "where an instrument is taken either in satisfaction therefor or as security therefor," are interpolated after the word "value" in the second sentence. For comments of Professor Williston on this chapter see *supra,* pp. 91-93.

Under the Wisconsin form of this section, it was held that a bank was not a holder in due course of bonds and notes indorsed to it, as collateral for a pre-existing debt, and thereafter purchased by the bank on sale as collateral, where there was no other consideration or agreement and no extension, discharge, or extinguishment of the pre-existing debt. Badger Machinery Co. v. Columbia Co. Electric Light & Power Co. (Wis.), 163 N. W. 188.

But where notes were given for a pre-existing debt and before delivery were guaranteed by defendants severally as for value received, the pre-existing debt being due and payable when the notes were given, the giving of the notes was an extension of the time of payment of the debt and such benefit to the debtor was a sufficient consideration for defendant's guaranty. Holmes v. Wisconsin Grain, etc., Co. (Wis.), 164 N. W. 1007.

By statute, in Wisconsin, bonds issued by a corporation except for "money, labor or property," were declared to be void. *Held,* that this statute was not repealed by the Negotiable Instruments Law, and that bonds issued for antecedent debts were not issued

[1] Eckels v. Cornell, etc., Co., 119 Md. 107, 86 Atl. 38.

[2] "An antecedent debt or liability." B. E. A. s. 27 (1) (b).

for "money, labor or property" and were void. Nichols v. Waukesha Canning Co., 195 Fed. Rep. 807.

Russell Electric Co. v. Bassett, 79 Conn. 709, 66 Atl. 531; Crawford Co. Bank v. Stegeman, 137 Iowa, 13, 114 N. W. 549; Gooch v. Gooch (Iowa), 160 N. W. 333; Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, S. C. secs. 14, 52; Mohlman v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; Singer Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; Murchison Nat. Bank v. Dunn Co., 150 N. C. 683, 64 S. E. 885; American Exch. Nat. Bank v. Segroves, 166 N. C. 608, 82 S. E. 947; Second Nat. Bank v. Werner, 19 N. D. 485, 126 N. W. 100; Hamilton Mach. Tool Co. v. Memphis Nat. Bk., 84 Ohio St. 184, 95 N. E. 777; Allentown Nat. Bank v. Clay Co., 217 Pa. 128, 66 Atl. 252; Colley v. Summers, etc., Co., 119 Va. 439, 89 S. E. 906, S. C. sec. 2-5; Ford v. Engleman, 118 Va. 89, 86 S. E. 852; Pelton v. Spider Lake Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963, S. C. sec. 56; H. Scherer & Co. v. Everest, 168 Fed. 822, 94 C. C. A. 346.

(*a*) A sale of goods to the maker of a note is a consideration for the indorsement of a third person before the delivery of the note. Mohlman v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046.

An outlawed debt is a good consideration for a check and the check need not state the consideration. Baxter v. Brandenburg (Minn.), 163 N. W. 516, S. C. sec. 61.

A husband bought land and took the title in the name of his daughter. *Held*, that his wife had marital rights in the land which formed sufficient consideration for a check given to her by her husband to compensate her therefor. *Ib.* The N. I. L. was not cited in this case.

The note in suit was given by X's brother to the defendant on account of a defalcation by X. The plaintiff who was X's brother's wife sued to recover stock owned by her and pledged as security for the note. *Held*, that the note was not without consideration. The N. I. L. was not cited. Domax v. Colorado Nat. Bank, 46 Colo. 229, 104 Pac. 85.

A note was executed to a bank by the defendant under the influence of a threat by the state superintendent that unless certain assets were made good the bank would be closed and the defendant's brother prosecuted. In an action on the note by the state superintendent of banks. *Held*, that the defense of want of consideration was not available, but that of duress was The N. I. L. was not cited. State v. Hills, 94 Ohio St. 171, 113 N. E. 1045, L. R. A. 1917B, 684.

Defendant's testator, a lawyer representing the plaintiff, unwittingly invested plaintiff's money in forged notes certified by a certain notary public to be genuine, and upon discovery of the forgery stated to plaintiff that he was at fault in not exercising more care, took the forged notes and gave to plaintiff his own notes for the amount and paid interest thereon until his death. *Held,* that there was valuable consideration for these notes. The N. I. L. was note cited. Hyman v. Succession of Parkerson, 140 La. 249, 72 So. 953, L. R. A. 1917B, 694.

A bank having sustained a loss was carrying some worthless assets. In order that these should not be charged off out of surplus and thus reduce the value of the bank's stock, of which they were large holders, the president and certain of the directors made a note to the bank for the amount of the loss, the president signing as maker and the directors as indorsers, but all agreeing to sustain a joint liability for the amount. *Held,* that the note was supported by sufficient consideration in the benefit to the directors from maintaining the value of their stock. The N. I. L. was not cited on this point. Union Bank v. Sullivan, 214 N. Y. 332, 108 N. E. 558, S. C. secs. 66, 70, 80, 123.

If a mere credit on the books of a bank does not of itself amount to the payment of a valuable consideration, the withdrawal by check of a substantial part of the amount so credited is such payment. Bland v. Fidelity Trust Co. (Fla.), 71 So. 630, L. R. A. 1916F, 209, S. C. secs. 56, 124; Citizens' Nat. Bank v. Bucheit (Ala.), 71 So. 87, S. C. secs. 3, 60; Sherrill v. Merchants, etc., Bank (Ala.), 70 So. 723, S. C. sec. 30, *contra.*

A bank receiving a certificate of deposit and crediting the same to the depositor, does not give value where the credit was not absolute but conditional upon the collection of the certificate. Commercial Nat. Bank v. Citizens' State Bank, 132 Iowa, 706, 109 N. W. 198.

A customer, who deposits with his bank checks or drafts upon other banks, which gives him credit therefore in his general account, which is subject to check, thereby transfers the title to the checks or drafts to the bank and renders it his debtor in the amount credited to him, in the absence of an agreement to the contrary. Security Nat. Bank v. Old Nat. Bank, 241 Fed. Rep. 1.

A bank bought a note and credited the price to the seller's account which was afterwards sometimes overdrawn. The bank knew of no defense to the note until after its maturity. *Held,* that the fact that at various times before maturity as well as at maturity and at the beginning of the action the seller had a balance in bank, did not prevent the bank from being a *bona fide* purchaser for value. Northfield Nat. Bank v. Arndt, 132 Wis. 383, 112 N. W. 451. See also cases under secs. 26, 52-3.

In an exchange of checks each check is a consideration for the other; each is an independent obligation and not conditional on the payment of the other. Hence, one who *bona fide* gives his check for that of a third person without notice of the illegality of

such check is not bound to stop payment of his own check upon receiving notice of the illegality of the check exchanged for his, and he may recover against the drawer of such check. Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 53, 56, 186.

One note is good consideration for another note given in exchange. Mehlinger v. Harriman, 185 Mass. 245; Franklin Nat. Bank v. Roberts Bros., 168 N. C. 473, 84 S. E. 706, S. C. sec. 17-2.

The cancellation of an old note is a good consideration for a new note. Fidelity State Bank v. Miller, 29 Idaho, 777, 162 Pac. 244; Travis v. Unkart, 89 N. J. L. 571, 99 Atl. 320, Ann. Cas. 1917C, 1031.

The surrender of a note and collateral and extinguishment of the debt, whether before or after maturity, is value. Section 25 was, however, not cited. Ward v. City Trust Co., 117 App. Div. 130, 102 N. Y. Supp. 50. This case was reversed on another ground in 192 N. Y. 61, *infra,* sec. 56.

The surrender of a non-negotiable note is sufficient consideration for a negotiable note. Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed, 173 N. Y. 596 without report.

A promise to forbear suing on an antecedent debt is value. Milius v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669.

Extension of time of payment of an antecedent debt in consideration of the maker's depositing shares of stock as collateral security, constitutes value sufficient to protect the pledgee as a holder of the stock for value. American Nat. Bank v. Dew (N. C.), 94 S. E. 708.

An agreement by the creditor to extend the time for payment of a debt of a third person is sufficient consideration for a note given to secure such debt. The N. I. L. was not cited. Citizens Bank v. Oaks, 184 Mo. App. 598, 170 S. W. 679.

A note secured by mortgage was executed and delivered, the money to be advanced from time to time. *Held,* that there was a consideration for the note, although the money was never advanced. Marling v. FitzGerald, 138 Wis. 93, 120 N. W. 388, S. C. secs. 49, 58. The decision is equivalent to holding that a promise to pay money is a valuable consideration for a promissory note, which accords with the definition of value in section 25, which was, however, not cited by the court. See comment on this case, *infra,* sec. 49, p. 157.

Defendant, by mistake, gave a check to the payee, who indorsed it to plaintiff as a loan. *Held,* that plaintiff was not a holder in due course, having given no value. Rosenthal v. Parsont, 110 N. Y. Supp. 223.

The payee of a note upon receiving it paid an indebtedness of the maker due to a third person. *Held,* that the payee was a holder for value. Hermann's Exr. v. Gregory, 131 Ky. 819, 115 S. W. 809, S. C. sec. 14.

A check indorsed by the payee came to the drawee bank through the clearing house, but the drawer had stopped payment though

having funds on deposit to pay the check. By error of the paying teller, the "stop payment" order was ignored and the check charged to the drawer's account. The error was discovered and the amount credited back, but the check was not returned within the time fixed by clearing house rules to discharge the drawee bank from liability and the payee was paid. The drawer drew out all his funds from the bank. The drawee bank assigned the check to the paying teller, who sued the drawer on it. *Held,* that the check was not extinguished, that there was valuable consideration for the transfer from the payee and that defendant was liable. The N. I. L. was not cited. Usher v. A. S. Tucker Co., 217 Mass. 441, 105 N. E. 360, L. R. A. 1916F, 826, S. C. sec. 79.

A transfer of a negotiable note as collateral security for a note and indebtedness then made is a transfer for value. First Nat. Bank v. John McGrath & Sons, 111 Miss. 872, 72 So. 701; Second Nat. Bank v. Warner, 19 N. D. 485, 126 N. W. 100.

A promissory note contained a stipulation that if the collateral security should cease to be satisfactory to the owner thereof, the maker would deposit additional security as demanded. The holder demanded additional security and defendant, without consideration to her or to the maker or detriment to the holder, indorsed the note. *Held,* that the indorsement was a *nudum pactum* and that the defendant was not liable to the holder. Zadek v. Forchheimer (Ala. App.), 77 So. 941.

(*b*) Payment or part payment of a pre-existing debt is value. Lovelace v. Lovelace, 136 Ky. 452, 124 S. W. 400; Smith v. Johnson, 224 Mass. 50, 112 N. E. 644, *semble;* Bigelow Co. v. Automatic Gas Co., 56 Misc. Rep. 389, 107 N. Y. Supp. 894; Wallabout Bank v. Peyton, 123 App. Div. 727, 108 N .Y. Supp. 42; Mindlin v. Appelbaum, 62 Misc. Rep. 300, 114 N. Y. Supp. 908; Albert v. Hoffman, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043, S. C. sec. 12; Broderick, etc., Co. v. McGrath, 81 Misc. Rep. 222, 142 N. Y. Supp. 49, S. C. sec. 59; Ogle v. Armstrong (Okla.), 153 Pac. 1139.

The payee of a note given in payment of a bill is a "holder for value," whether the note was payable on demand or not. Wilbor v. Hawkins, 38 R. I. 119, 94 Atl. 856, S. C. sec. 29.

Money obtained by fraud and transferred in payment of a pre-existing debt can not be recovered from the transferee. The same is true of the proceeds of a check fraudulently obtained and collected by the payee's creditor to whom it was transferred in payment of an existing debt, although the fraudulent payee did not indorse the check. The N. I. L. was not cited. Benjamin v. Welda State Bank, 98 Kan. 361, 158 Pac. 65, L. R. A. 1917A, 704.

A note given in payment of the debt of a third party is supported by sufficient consideration. The N. I. L. was not cited. Bridges v. Vann, 88 Kan. 98, 127 Pac. 604.

Defendant, who was the cashier and also a stockholder of plaintiff bank, executed a promissory note to the bank, which, with a sum of money advanced by the president, was used to make up a defalcation by some unknown person in order to prevent a run on the bank and prevent possible closing of the bank by the Comptroller of the Currency. *Held*, that there was a valuable consideration for the note. Utah Nat. Bank v. Nelson, 38 Utah, 169, 111 Pac. 907, S. C. sec. 2.

The cashier of a bank, being indebted to it, the defendant joined with the cashier in making a note to the bank to aid the cashier to borrow from the bank the amount of the note to apply to his indebtedness. The bank received the note and credited the amount on the cashier's debt. *Held*, that it was no defense that the defendant signed the note on the understanding that two other persons should sign the note before delivery, the bank being ignorant of this agreement and that the adverse interest of the cashier prevented his knowledge from affecting the bank. Helper State Bank v. Jackson (Utah), 160 Pac. 287.

One who gives a renewal note with knowledge of partial failure of consideration of the original note or false representations by the payee, waives such defense and can not set it up to defeat recovery on the renewal note. The N. I. L. was not cited on this point. Roess Lumber Co. v. State Exch. Bank, 68 Fla. 324, 67 So. 188, Ann. Cas. 1916B, 327.

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A note made merely in renewal of a prior note which was without consideration is invalid for want of consideration. Edwards v. Chancellor, 52 J. P. 454.

Where the payee of a check deposits it with his bank, and is credited with the amount, the bank is a holder for value. Royal Bank v. Tottenham [1894], 2 Q. B. 715, 717, 718; Capital & Counties Bank v. Gordon [1903], A. C. 240, 245, *semble*. *A fortiori* if the amount is drawn out by the depositor. National Bank v. Silke [1891], 1 Q. B. 435, 439.

But in Gaden v. Newfoundland Sav. Bank [1899], A. C. 281, the Privy Council held that when the depositor's account was not overdrawn, the bank took a bearer check as agent for collection only. *Sed quaere?* See Watson on Checks, 4th Ed., 51.

An antecedent or pre-existing debt is value, even though the instrument is transferred merely as collateral security for such debt. Vogler v. Manson (Ala.), 76 So. 117, overruling Miller v. Johnson, 189 Ala. 354, 66 So. 486, in which case the change in the law by section 25 was overlooked; Crystal River Lumber Co. v. Consol. Naval Stores Co., 63 Fla. 119, 58 So. 129; Many Blanc & Co. v. Krueger, 153 Ill. App. 327, S. C. sec. 29; Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237, *semble*, S. C. secs. 4, 56; State Bank v. Bilsted, 162 Iowa, 433, 136 N. W. 204. S. C, sec. 4-3; Citizens' Bank v. Bank of Waddy's Receiver, 31 Ky. L. Rep. 365, 103 S. W. 249; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, S. C.

sec. 52-2; Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1; Graham v. Smith, 155 Mich. 65, 118 N. W. 726; Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643, S. C. secs. 3-2, 25, 55; Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070; Nat. Bk. of Commerce v. Morris, 156 Mo. App. 43, 135 S. W. 1008, accord; State Bank v. Cape Girardeau Co., 172 Mo. App. 662, 155 S. W. 1111, S. C. sec. 27; Central Bank v. Lyda (Mo. App.), 191 S. W. 245; Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, S. C. sec. 112; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822, *semble;* American Nat. Bank v. Dew (N. C.), 94 S. E. 708, *semble;* Smathers v. Toxoway Hotel Co., 162 N. C. 346, S. C. secs. 56, 59; Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117, S. C. secs. 62, 66; Felt v. Bush, 41 Utah, 462, 126 Pac. 688; Helper State Bank v. Jackson, 48 Utah, 430, 160 Pac. 286; Payne v. Zell, 98 Va. 294, 36 S. E. 379; see also, Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14, S. C. secs. 52, 52-1; German-American Bank v. Wright, 85 Wash. 460, 148 Pac. 769, S. C. secs. 56, 186; Samson v. Ward, 147 Wis. 48, 132 N. W. 629, S. C. sec. 55; Scherer v. Everest, 168 Fed. 822, 94 C. C. A. 346; Melton v. Pensacola Co., 190 Fed. (Ky.) 126, 111 C. C. A. 166; Lowell v. Bickford, 201 Mass. 543, 545.

The New York courts have pursued an uncertain course as to this question. In the first case[1] the court held that the language of the section ought to leave no room for doubt and that a transfer as security for an antecedent or pre-existing debt was a transfer for value. Then followed several cases[2] which adhered to the old New York rule of Coddington v. Bay, 20 Johns. 637, and subsequent like cases holding that a transfer as security for an antecedent or pre-existing debt was not a transfer for value.

Subsequently, in King v. Bowling Green Trust, 145 App. Div. 398, 129 N. Y. Supp. 977, the question involved being, whether upon the deposit of a check on another bank, when the depositor was indebted to the receiving bank on a check account, the receiving bank became a holder for value, the court said: "While no case in this state on the point has been called to our attention, it seems plain that sections 24 and 25 were intended to bring the law of this state into harmony with that of the other states and of the federal courts." Later, in several cases,[3] it was held that a transfer in payment of an antecedent debt was a transfer for value.

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[1] Brewster v. Shrader, 26 Misc. Rep. 480, 56 N. Y. Supp. 606, S. C. sec. 112.

[2] Sutherland v. Mead, 80 App. Div. 377, 83 N. Y. Supp. 749; Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925; National Bank v. Foley, 54 Misc. Rep. 126, 103 N. Y. Supp. 553, S. C. secs. 52-3, 59; Gansevoort Bank v. Gilday, 53 Misc. Rep. 107, 104 N. Y. Supp. 271; Harris v. Fowler, 59 Misc. Rep. 523, 110 N. Y. Supp. 987; Bank of America v. Waydell, 103 App. Div. 25, 33, 92 N. Y. Supp. 666, affirmed 187 N. Y. 115, 79 N. E. 857, but not passing on this point. Rogowski v. Brill, 131 N. Y. Supp. 589.

[3] Broderick, etc., Rope Co. v. McGrath, 81 Misc. Rep. 199, 142 N. Y. Supp. 497, S. C. sec. 55; Brown v. Brown, 91 Misc. Rep. 199, 154 N. Y. Supp. 1098.

In these two cases the courts expressed the opinion, in substance, that, without overruling the earlier decisions, the later cases tended to show that section 25 had the effect of adopting in this state the rule prevailing in the federal courts and in other states under the N. I. L., that a pre-existing debt without extension or forbearance is a sufficient consideration to constitute a holder for value. Still later in A. E. McBee Co. v. Shoemaker, 174 App. Div. 291, 160 N. Y. Supp. 251, the court while holding that a transfer in absolute payment of a pre-existing debt is a transfer for value, considered briefly the question of a transfer merely as security and stated that this court in King v. Bowling Green Trust, *supra*, had unanimously expressed the opinion that the N. I. L. effected a change from the rule of Coddington v. Bay, to conform the law here to the rule in the federal courts and in other states. In the absence of any decision upon this point by the Court of Appeals, it can not be said with certainty what the law of New York is, but it is not unreasonable to believe that when the question comes before the Court of Appeals for decision that court will be found in harmony with all the other courts above mentioned which have passed upon the question.

The narrow construction put upon section 25 by some of the inferior courts of New York, which, if sustained by the Court of Appeals,[1] will destroy the uniformity of the law in this regard, has been criticised by Hon. Amasa M. Eaton, President of the Commissioners on Uniform Legislation in 27 Reports of American Bar Association 658. See also, further review and criticism of New York cases by Mr. Eaton in 34 Reports of American Bar Association 1034. See also, 2 American Bar Association Journal 61-62 (January, 1916).

The only case found in Pennsylvania is Raken v. Henry, 16 Pa. Dist. Reports, 207, in which case the court followed the New York case of Sutherland v. Mead, *supra*, and adhered to the former rule of the state and refused to follow the Virginia case of Payne v Zell, *supra*, and the North Carolina case of Brooks v. Sullivan, *supra*, upon the construction of section 25. The court remarked: "Both of these cases are from states that can not in any sense be called commercial centers such as Pennsylvania and New York, and therefore, the view taken by them on a subject such as we here have under review is not entitled to the consideration that we might give to other cases from these states dealing with a different subject."

Perhaps the court might now be induced to change its opinion by the subsequent decisions in so many other courts, even though not located in "commercial centers."

In Missouri, the Appellate Court followed the former law of the state citing only old cases, and apparently unaware of the statute, since the act was not cited.[2]

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[1] See Kelso & Co. v. Ellis, 224 N. Y. 528, 121 N. E. 364, in which the court indicates that this narrow construction is erroneous. See also, 19 Colo. Law Rev. 218.

[2] Wright v. Mississippi Trust Co., 144 Mo. App. 640, 129 S. W. 407; Golden City Bkg. Co. v. Greisdel, 161 Mo. App. 477, 144 S. W. 166.

In Kansas, also, it has been said, citing only an old case prior to the act, but not citing the N. I. L. on this point, that taking a note as security for an existing debt is not parting with value.[1]

Any doubt which can possibly exist as to the correct interpretation of section 25 is certainly to be resolved in favor of the majority view by section 27. The transferee of a negotiable instrument, as security, has a lien on it, and under section 27, he is deemed a holder for value to the extent of his lien.

A transfer as security for an antecedent or pre-existing debt of a note signed for accommodation is a transfer for value. Martin L. Hall Co. v. Todd, 139 N. Y. Supp. 111; Maurice v. Fowler, 78 Misc. Rep. 357, 138 N. Y. Supp. 425;[2] Trust Co. v. Markee, 179 Fed. Rep. 764; Stein v. Jacobs, 20 Pa. Dist. Ct. 48.

Defendant signed a note for the accommodation of O to enable O to take up a forged note, which O had indorsed to plaintiff. *Held,* that defendant was liable whether O indorsed the forged note with knowledge of the forgery or not. Jennings v. Law, 199 Mass. 124, 85 N. E. 157, S. C. sec. 29.

The plaintiff bank received a note indorsed by the defendant for the accommodation of the maker in renewal of a prior note executed by the maker to the bank. The bank did not surrender the old note but placed it in its safe among other vouchers of the maker, who never called for the note or other vouchers. *Held,* that the bank was a holder for value of the note indorsed by the defendant. Citizens Nat. Bank v. Lilienthal, 40 App. Div. 609, 57 N. Y. Supp. 567.

In the case of *In re* Hopper-Morgan Co., 154 Fed. Rep. 249, it was held that both under the former law of New York and under this section, an accommodation note, given without any restriction upon its use, may be transferred merely as collateral security for an antecedent debt so as to make the indorsee a holder for value. Also that the assumption of the obligation of presenting the note for payment and giving notice of dishonor to indorsers was giving value, following Railroad Co. v. National Bank, 102 U. S. 14, and declining to follow the New York cases to the contrary, because they were not decisions of the highest court of the state.

In Smith v. Nelson Land & Cattle Co., 212 Fed. Rep. 56, 122 C. C. A. 512, S. C. secs. 4-2, 58, 184, 191, involving other sections of the N. I. L., the court held that where a question is governed by a Negotiable Instrument Law adopted by the state the federal court is bound to give force and effect to the statute if applicable.

An existing antecedent indebtedness may be sufficient consideration for a new note. It was sufficient consideration for the execution of a new note if the payee surrendered to the maker old notes executed by the maker's husband. If the indebtedness

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[1] Security State Bank v. Clarke, 99 Kan. 18, 160 Pac. 1149, S. C. sec. 119.

[2] Even the New York courts had no difficulty with these cases of accommodation instruments because this was the old law of the State. Grocers Bank v. Penfield, 60 N. Y. 502.

of the husband drew six per cent., the fact that his wife's renewal note drew five per cent., showed sufficient consideration for the new note. The fact that the renewal note worked an extension of time for payment and the old indebtedness was sufficient consideration for the new note. Forbearance of the payee to make a claim against the husband's estate was sufficient consideration to support the wife's note. Mohn v. Mohn (Iowa), 164 N. W. 341.

Defendant, at the request of the cashier of the plaintiff bank, made a note payable to the bank to reduce the debt of an insolvent corporation of which the cashier of the bank owned most of the stock. *Held,* that although a pre-existing debt is value under the Negotiable Instruments Law, this is not so where such debt was worthless and the obligation of a third party. Citizens Trust Co. v. McDougald, 132 Tenn. 323, 178 S. W. 432, L. R. A. 1917C, 840. *Sed quaere?* The plaintiff had the right to sue and get judgment against the corporation and the surrender of this right was a sufficient consideration without regard to the question whether the judgment could be executed. The cases cited by the court run back to Jones v. Ashburnham, 4 East, 455, in which case there was no debtor whom the creditor could sue at the time of defendant's promise and there could be none, because the original debtor had died, leaving no assets which could be the basis of administration, and no administrator could be appointed; therefore, the creditor had no right of action against anyone to give up as consideration for defendant's promise.

Defendant gave a note for a debt of her deceased husband, whose estate was not shown to be insolvent and to the whole of which she may have been entitled. *Held,* that the note was not unenforceable for want of consideration. The burden of showing insolvency of the husband's estate was on the maker, or that she was not entitled to the whole of it. The N. I. L. was not cited. Vaughan v. Bass, 10 Ala. App. 388, 64 So. 543.

Where a bank took a note as collateral security for a note of another person, which the bank then held, the bank became a holder for value. So also if the bank took the note in exchange for the note of such other person. Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114, S. C. sec. 59.

In Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436, it was held, that a wife's note given to a third person in payment of her husband's debt is for a valuable consideration; but a note given as security for such debt, previously existing, is not. To make a note of the latter kind valid, there must be a new consideration. No reference was made to the N. I. L. Later in Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1, it was held, citing section 25, that taking a demand note as collateral for the pre-existing debt of a husband to a bank made the bank a holder for value of the note as against the wife who was an accommodation maker. There was also a promise by the bank to forbear pressing for payment of the original debt for a time. The court distinguished Widger v. Baxter by saying that there was no pre-existing

debt in existence when the wife's note was given. It had been barred by a discharge of the husband in insolvency. In Neal v. Wilson, 213 Mass. 336, 100 N. E. 544, it was held that "where a defendant, for the accommodation of a debtor and without consideration, gives his note or check to a creditor of the debtor in payment of or as security for the debt due from the debtor to the creditor, he is liable to the creditor on the note or check. That is the rule of the Negotiable Instruments Act, section 29, which governs the case. The Negotiable Instruments Act in this regard is a codification of the common law." The check in this case was given to make good an overdraft of the debtor but the court used the broad language quoted. In Seager v. Drayton, 217 Mass. 571, 105 N. E. 461, it was said that a note which was given for the note of a third person was supported by a sufficient consideration if the note was given for forbearance to sue the third person or in substitution for the note of the third person or in payment of or as security for the debt. There is a reasonable implication in this case, which is obscurely stated, that there was forebearance. The N. I. L. was not cited in this case.

A pre-existing indebtedness is a sufficient consideration for the execution of a renewal note containing a stipulation for the waiver by the maker of the defense of the statute of limitations, although the original note did not contain such stipulations. Parchen v. Chessman, 49 Mont. 326, 142 Pac. 631, Ann. Cas. 1916A, 681.

Where one having possession of notes, indorsed by the payees, wrongfully pledged them by way of substitution for other collateral held by the pledgee for an antecedent debt, the pledgee became a holder for value. Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, S. C. sec. 59.

Sec. 26. What Constitutes Holder for Value.

Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed 173 N. Y. 596, S. C. sec. 25; Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925.

An allegation in an answer that the note was executed and indorsed without any consideration is insufficient, the allegation of the complaint that the payee indorsed and delivered the note

for value before maturity having been admitted. Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49, S. C. secs. 30, 52.

Where defendant is sued on a note which is subject to an equity against the payee, it is not a sufficient defense to allege that the plaintiff bank in discounting the note merely gave credit to the transferor on its books. Defendant must also allege that the money remained in the bank to the credit of the discounter at the time of notice of the equity to the bank. Richards v. Street, 31 App. Cas. D. C. 427, *semble*, S. C. sec. 14.

The payee of notes, who had put money in the hands of X to be loaned, received from X the notes signed by defendants and credited X with the amounts in her accounts with him. Defendants defended on the ground that they had received no consideration. *Held*, that plaintiff was a holder for value. Metzger v. Sygall, 83 Wash. 80, 145 Pac. 72, S. C. sec. 37-2.

The holder of a note for $2,000, surrendered it for a payment of $500, and a new note for $1,500 executed by the maker and indorsed by defendant. *Held*, that the holder of the new note was a holder for value. Van Norden Trust Co. v. L. Rosenberg, 62 Misc. Rep. 285, 114 N. Y. Supp. 1025.

Sec. 27. When Lien on Instrument Constitutes Holder for Value.

Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49, S. C. secs. 26, 30, 52; Brown v. James, 80 Neb. 475, 114 N. W. 591; Benton v. Sikyta, 84 Neb. 808, 122 N. W. 60, 24 L. R. A. (N. S.) 1057; Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed 173 N. Y. 596, S. C. sec. 25; Batterman v. Butcher, 95 App. Div. 213, 88 N. Y. Supp. 685; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822, S. C. sec. 25; Payne v. Zell, 98 Va. 294, 36 S. E. 379, S. C. sec. 25; Canadian Bank of Commerce v. Sesnon Co., 68 Wash. 434, 123 Pac. 602; Trust Co. v. Markee, 179 Fed. Rep. 764, S. C. sec. 25; see Redfern v. Rosenthal, 86 L. T. Rep. 855, *infra*, sec. 52-2.

The indorsee of a note as collateral security for a loan, upon suit against the maker, can recover the whole amount of the note in the absence of any defense by the maker against the indorser. The N. I. L. was not cited. Hillman v. Stanley, 56 Wash. 320, 105 Pac. 816.

And the pledgee of the note can enforce collection of it at maturity, although the debt for which it was pledged is not yet due. *Ib.*

But if there be any defense against the indorser, the pledgee, although a holder in due course, can only recover on the note to the amount of the debt for which it was pledged. Elk Valley Coal Co. v. Third Nat. Bank of Lexington, 157 Ky. 617, 163 S. W. 766; Continental Credit Co. v. Ely (Conn.), 100 Atl. 434.

The *bona fide* pledgee of a note which bore eight per cent. interest against which there was an equity in favor of the maker against the payee, was allowed to recover the amount of the pledgee's debt, but interest thereon only at the legal rate, in the absence of evidence as to the rate which the principal debt was to bear. Citizens' Bank v. Limpright, 93 Wash. 361, 160 Pac. 1046, S. C. sec. 52.

A note for $200, obtained by fraud practiced by the payee upon the defendant maker, was indorsed and delivered by the payee to the plaintiff upon a contract that if the plaintiff would become surety for the payee on a note to a third person for $100 and if the plaintiff should be obliged to pay the note on which he was surety the said note for $200 should become the property of the plaintiff. The plaintiff was obliged to pay the note for $100 and sued the defendant upon his note for $200. *Held,* that the plaintiff had become the sole owner of the note made by the defendant and was not a mere lien holder, under section 27, and having no notice of infirmity in the paper he was a holder in due course and could recover the full amount. Jett v. Standafer, 143 Ky. 787, 137 S. W. 513, S. C. sec. 23.

The holder of notes taken as collateral security for a pre-existing indebtedness in excess of the notes, is a holder for value to the entire amount of the notes. State Bank v. Cape Girardeau Co., 172 Mo. App. 662, 155 S. W. 1111.

A note deposited as collateral security for a loan made in violation of the Massachusetts Small Loans Act is not void, but voidable. Where it was repledged to a holder in due course, who sold it for less than its face to a person with notice, the latter can recover the full face of the note from the maker, although his transferror could not recover more than the amount for which the note was repledged to him. Burnes v. New Mineral Fertilizer Co., 218 Mass. 300, 105 N. E. 1074. See this case discussed in 28 Harvard Law Rev. 103.

A note was left with a bank for collection with instructions that, when collected, the proceeds were to be applied on the indebtedness of the payee to the bank, but there was no assignment of the note as collateral security. It was held that the bank's title was subject to equities against the payee. Schneider v. Johnson, 161 Mo. App. 375, 143 S. W. 78. It is submitted that if the note was indorsed by the payee, which does not appear, but would seem to be necessary to enable the bank to collect it, the decision is wrong. If the bank had the legal title and the right to appro-

priate the proceeds, it had a lien and the case would be clearly within section 27. The N. I. L. was not cited in the case.

Plaintiff's complaint set forth a negotiable note made by defendant to the order of one P for $10,000, and alleged that P indorsed the note, which was before maturity and for value purchased by plaintiff and that plaintiff was the legal owner and holder thereof. Defendant denied the indorsement and transfer of the note and alleged an equity against P and that plaintiff took the note with notice thereof. These allegations were traversed by the reply. It appeared in testimony that P borrowed $4,000 from one A giving his note therefor and delivered defendant's note indorsed in blank to A as collateral security. That thereafter A, for value, indorsed P's note and transferred it and defendant's note as accompanying collateral to plaintiff, all said transfers being before maturity of defendant's note. *Held,* that under the pleadings, the defendant, not having raised the question of collateral and the amount of the note for which it was pledged, was not entitled to rely on section 27, and the judgment for plaintiff for the full amount of defendant's note was sustained. Bailey v. Inland Empire Co., 75 Ore. 309, 146 Pac. 991. The court said that since the distinction between suits in equity and actions at law was still maintained in Oregon, it was doubtful whether it could compel the plaintiff to litigate a question between the defendant and P, who not being a party to the action would not be bound by any judgment thereon. This case suggests the interesting question, whether, in spite of section 27, a court must not give the lienholder judgment for the full amount of the instrument, unless the party against whom the equity exists is made a party to the action in jurisdictions where that is permitted, or a bill in equity is filed against the maker and such party in jurisdictions where the distinction between law and equity is maintained.

If a plaintiff has no interest in the note sued upon except as collateral security for a note held by him, he can not recover on the collateral note if the principal note is wholly invalid. The N. I. L. was not cited on this point. Omaha Loan & Bldg. Assn. v. Cocke (Neb.), 165 N. W. 146.

Sec. 28 Effect of Want of Consideration.

Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise.[1]

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[1] Not in B. E. A.

Padgett v. Lewis, 54 Fla. 177, 45 So. 29; Lynds v. Van Valkenburgh, 77 Kan. 24, 93 Pac. 615; Dicks v. Johnson, 66 La. 306, 63 So. 700; Herman v. Combs, 119 Md. 41, 85 Atl. 1044; Green v. Ostrander, 160 Mich. 662, 125 N. W. 735; Joveshof v. Rockey, 58 Misc. Rep. 559, 109 N. Y. Supp. 818; Ferguson v. Netter, 141 App. Div. 274, 126 N. Y. Supp. 107; Hamilton v. Ramage, 89 Wash. 649, 156 Pac. 151.

Parol evidence is admissible to show absence or failure of consideration as against one not a holder in due course. Jefferson Co. Bank v. Compton, 192 Ala. 16, 68 So. 261. Praes v. Vollintine, 53 Wash. 137, 101 Pac. 706.

In a suit beween remote parties to a bill of exchange, as the payee or indorsee and the acceptor, to sustain the defense of no consideration, there must have been no consideration received by the defendant and plaintiff must have given no consideration. National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. sec. 133, affirmed without opinion, 196 N. Y. 548. The N. I. L. was not cited on this point.

In an action by the payee against the acceptor of a bill of exchange, failure of consideration between the drawer and drawee is not a defense. Mt. Vernon Nat. Bk. v. Kelling-Karel Co., 189 Ill. App. 375, S. C. sec. 52-3.

A check was made by A to the order of B, to be used to pay C for withdrawing a charge of rape against B, alleged to be a false charge, and to prevent his rearrest on said charge. The check was indorsed by B to C and by C to plaintiff, without consideration, and upon payment being stopped, plaintiff sued A. *Held*, that A could not defend on the ground of duress which was not exercised on him, but that he could defend on the ground of want of consideration. Weiss v. Rieser, 62 Misc. Rep. 292, 114 N. Y. Supp. 983.

One of two joint makers of a note can not testify that he signed it because two names were necessary and on condition that he was not to pay the note but that the other maker was to have the money and pay the note. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636, S. C. sec. 125.

The delivery of goods to another is sufficient consideration for a note. Rudolph Wurlitzer Co. v. Rossman, 196 Mo. App. 78, 190 S. W. 636, S. C. sec. 20.

But failure of consideration is not a defense against a holder in due course. Interstate Finance Co. v. Schroeder, 74 W. Va. 67, 81 S. E. 552; Franz v. Schiro, 136 La. 841, 67 S. 925.

One who takes a note with knowledge that the consideration has failed is not a holder in due course and the defense is good against him. The N. I. L. was not cited. Washington Trust Co. v. Keyes, 88 Wash. 287, 152 Pac. 1029.

Plaintiff and defendant were surety makers on a note. Plaintiff paid the note at maturity to a holder in due course and sued

defendant for contribution. Defendant pleaded failure of consideration between the principal maker and the payee. *Held* no defense. The N. I. L. was not cited. Cummins v. Line, 43 Okla. 575, 143 Pac. 672.

Defendants bought a stallion, with an option to return him for another if he proved unsatisfactory, and gave a note therefor. The stallion proved unsatisfactory and died in the possession of defendants before the expiration of the time fixed within which they might return him. The note was negotiated to plaintiff, who had notice of the contract. *Held,* that defendants were liable on the note, since they had stipulated for a certain remedy if the stallion was unsatisfactory, and were not entitled to another because his death made it impossible to return the stallion. Monticello State Bank v. Killiam (Ark.), 192 S. W. 369.

Where a note recited that it was given for a manure spreader, evidence of a contemporaneous collateral oral agreement that a knife grinder was also to be delivered without further charge, was admissible as showing partial failure of consideration, but not to show that the delivery of the knife grinder was a condition of the maker's liability. The N. I. L. was not cited. International Harvester Co. v. Parham (N. C.), 90 S. E. 503.

The maker of a note, who has been obliged to pay it by a holder in due course, can not recover the amount from the payee to whom the note was given without consideration and who accepted it. The N. I. L. was not cited. Dickinson v. Carroll, 21 N. D. 271, 130 N. W. 829.

In an action on a note, want of consideration is not available as a defense unless pleaded. The N. I. L. was not cited. Sharp v. Sharp, 145 N. Y. Supp. 386, citing Sprague v. Sprague, 80 Hun, 285, 30 N. Y. Supp. 162; Ryan v. Sullivan, 143 App. Div. 471, 128 N. Y. Supp. 632. *Contra,* Mechanics & Metals Nat. Bank v. Termini, 93 Misc. Rep. 1, 156 N. Y. Supp. 433, holding that section 28 expresses, not a rule of pleading, but a principle of substantive law, and also that a denial is a defense. This court also repeated the assertion that the burden of proof as to the existence of consideration of negotiable paper is upon the plaintiff, citing only an old New York case and Lombard v. Byrne, 194 Mass. 236, 80 N. E. 489, *supra,* sec. 24, in which no reference is made to the N. I. L. But in Gerli & Co. v. Doorly, 151 N. Y. Supp. 574, it was held that the burden of proving lack of consideration as a defense is on the defendant. The N. I. L. was not cited.

In Maryland, failure of consideration may be shown under the general issue. Morgan v. Cleaver (Md.), 101 Atl. 6110.

A general averment of want of consideration is sufficient without stating the facts. The N. I. L. was not cited. Zebold v. Hurst (Okla.), 166 Pac. 99. *Secus,* as to pleading failure of consideration. *Ib.*

Partial failure of consideration may be shown under a plea of total failure. Nat. Tube Co. v. Ice Machine Co., 201 Mo. 36, 98 S. W. 620; Lebrecht v. Nellist, 184 Mo. App. 334, 171 S. W. 11;

Glasse v. King (Mo. App.), 195 S. W. 521. The N. I. L. was not cited in these cases.

On an issue of failure of consideration, where there is some substantial evidence tending to prove such failure, it is error to direct a verdict for the plaintiff. Gardner Lumber Co. v. Bank of Commerce (Fla.), 74 So. 313; Glass v. Virginia-Carolina Chemical Co. (Fla.), 74 So. 981. The N. I. L. was not cited in these cases.

The drawer of a draft has the burden of overcoming the presumption of consideration established by the execution of the draft. Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706.

The burden of proof to show want of consideration is on the defendant both under this section and at common law. Piner v. Brittain, 165 N. C. 401, 81 S. E. 462. This case is sound in principle, although there are cases to the contrary, which violate the correct rule of pleading and evidence. *Supra*, sec. 24, pp. 95-98.

In McCormack v. Williams, 88 N. J. L. 170, 95 Atl. 978, the court that "in section 28 of our Negotiable Instruments Act it is expressly provided that the absence or failure of consideration shall be a matter of defense as against any person not a holder in due course, that is not a holder before maturity without notice of any invalidity in the instruments. This defense does not speak for itself. It has to be interposed and proved." In this case the defendant having set up want of consideration to the knowledge of the plaintiff as a defense, the plaintiff offered the notes in evidence and rested. The defendant and two other witnesses gave testimony which, if believed, showed that the notes lacked consideration. No witnesses were examined for the plaintiff. It was held that the trial judge erred in directing a verdict for the defendant. The notes gave inherent evidence of validity. That all the individual witnesses, who testified, gave evidence tending to show their invalidity, no matter how strong that evidence, raised, in effect, a conflict of testimony, and conflicting testimony is always for the jury.

In Rhodes v. Guhman, 156 Mo. App. 344, 362, 137 S. W. 86, it was held that a note "being a written instrument for the payment of money imported a consideration and the burden of proving failure of consideration was on the defendant." The N. I. L. was not cited, but another section of the statute, sec. 27, 74 R. S. 1909, by which a promissory note imports a consideration.

In Holmes v. Farris, 97 Mo. App. 305, 311, 91 S. W. 116, it was held, not citing the N. I. L., but referring to the same provision of the statute as in the preceding case in the revision of 1899, that "the burden of proof was upon the defendant to establish by a preponderance of the evidence the want of consideration he alleged."

In Carter v. Butler, 264 Mo. 306, 174 S. W. 399, Ann. Cas. 1917A, 483, S. C. sec. 30, it was held, citing section 28, that in an action on a note, which the answer admitted was given in consideration of the transfer to defendants of certain mining prop-

erty, with a warranty of title, the burden is on defendants to show that possession of the property had not been delivered, or that they had been deprived of a part thereof on account of a failure or defect of title, since the note imports a consideration throwing the burden upon defendants to prove affirmatively that consideration was lacking or had failed, while the word "transfer" implies a delivery of possession. Cases under section 25, *supra,* should also be consulted.

Sec. 29. Liability of Accommodation Party.

An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

The Illinois Act omits the words "without receiving value therefor" in line three and adds at the end of the section "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

AMES: The clause "without receiving value therefor" is inaccurate and misleading. If A gives B $10 to induce B to sign a note for $1,000 for A's accommodation, no one would doubt that B would be an accommodation party, yet if he is, the above clause is erroneous.

BREWSTER: The definition in section 29 is the same as in the cases, text books and law lexicons.

MCKEEHAN: As stated by Mr. Arthur Cohen, "Without receiving value therefor" means without receiving value for the bill and not without receiving any consideration for lending his name. So B is an accommodation party if he received no value for the instrument, though he did receive $10 for signing his name to it. [See Morris County Brick Co. v. Austin, *infra,* p. 119, in which this construction is adopted.—Ed.]

Tatum v. Commercial Bank & Trust Co., 185 Ala. 249, 64 So. 561, S. C. secs. 28, 29, 52, 59; Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; Security Tr. & Safe Dep. Co. v. Duross, 27 Del. 111, 86 Atl. 209; Willard v. Crook, 21 App. D. C. 237, S. C. sec. 66; Bankers Iowa St. Bk. v. Mason Hand Leather Co., 121 Iowa, 570, 90 N. W. 612; Farmers Loan & Trust Co. v. Brown (Iowa), 165 N. W. 70, S. C. sec. 14; Young v. Exchange Bank of Kentucky, 152 Ky. 293, 153 S. W. 444, Ann. Cas. 1915B, 148; Schaffter v. Irwin, 139 La. 92, 71 So. 241; First State Bank v. Davis, 139 La. 723, 72 So. 185; Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781; Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1; Neal v. Scherber, 207 Mass. 323, 39 N. E. 628; Eaves v. Keeton (Mo. App.), 193 S. W. 629, S. C. secs. 63, 68, 118; Golden City Banking Co. v. Munn, 184 Mo. App. 515, 170 S. W. 448; Clark v. Barthold, 87 N. J. L. 255, 93 Atl. 699; First Nat. Bank v. Dorvall, 89 N. J. L. 298, 98 Atl. 476; Blag & Eng. Co. v. Nor. Bk., 206 N. Y. 400, S. C. sec. 192; Citizens Nat. Bk. v. Lilienthal, 40 App. Div. 609, 57 N. Y. Supp. 567, S. C. sec. 25; Nat. Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422, S. C. sec. 119; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66; Metropolitan Printing Co. v. Springer, 90 N. Y. Supp. 376; Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925; Gansevoort Bank v. Gilday, 53 Misc. Rep. 107, 104 N. Y. Supp. 271; White v. Savage, 48 Ore. 604, 87 Pac. 1040; Federal Nat. Bank v. Cross Creek Co., 220 Pa. 39, 68 Atl. 1018; Northern Bank & Trust Co. v. Graves, 79 Wash. 411, 140 Pac. 328; Schoenwetter v. Schoenwetter, 164 Wis. 131, 159 N. W. 737; *In re* Troy & Cohoes Shirt Co., 136 Fed. Rep. 420, S. C. sec. 56; *In re* Hopper-Morgan Co., 156 Fed. 525; *In re* McCord, 174 Fed. Rep. 72, S. C. sec. 68; Trust Co. v. Markee, 179 Fed. Rep. 764, S. C. sec. 25.

The definition of "accommodation" as being the lending of credit by one to another, who gives no consideration therefor, is correct, and, as far as it goes, sufficient, if no more specific instruction is asked. The N. I. L. was not cited. Sales v. Martin, 173 Ky. 616, 191 S. W. 480.

Parol evidence is admissible to show whether a party is an accommodation party and also to determine which party he accommodated. Ryan v. Sullivan, 143 App. Div. 471, 128 N. Y. Supp. 632; Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 64-2, 64-3, 68.

For other cases involving the question whether defendant signed for the accommodation of the plaintiff or of some other party, see *infra,* p. 121.

Parol evidence is admissible against one not a holder in due course to show that a note was signed for accommodation and was to be used for a certain purpose only, notwithstanding such evi-

dence varies the agreement to pay money absolutely. Schlamp v. Maneval (Mo. App.), 190 S. W. 658, S. C. sec. 58.

The rule that upon transfer of a promissory note the payee's indorsement can not be varied by parol, does not prevent the showing of want of consideration or that the paper was accommodation paper. State Bank v. Pangerl (Minn.), 165 N. W. 479.

One is not shown to be an accommodation or an accommodated indorser by the mere fact that a car for the purchase price for which the note was given was purchased both for him and the maker of the note. Overland Auto Co. v. Winter (Mo. App.), 180 S. W. 561, S. C. sec. 63.

Defendant made a note to its own order and indorsed it for the accommodation of X, who also indorsed the note, which was negotiated to the plaintiff for value. *Held*, that evidence was not admissible to show an oral agreement between all the parties that the note was to be paid by X. Gerli v. National Mill Supply Co., 78 N. J. 1, 73 Atl. 252.

The payee of a note does not accept defendant, one of the makers, as a surety, merely because he knows that the defendant is not actually the principal debtor, since an accommodation party, though known to be such is liable to a holder for value. Jamesson v. Citizens' Nat. Bank (Md.), 99 Atl. 994, S. C. sec. 122.

In the absence of an agreement to the contrary, as between themselves, successive accommodation parties are liable in the order in which their names appear, even though later signers knew that prior parties signed for accommodation. Noble v. Beeman-Spaulding Co., 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162, S. C. secs. 63, 68, 121, 192.

One, who for the accommodation of the maker, guarantees the payment of a note, is not an accommodation party within this section, because he is neither maker, drawer, acceptor or indorser. *Ib.*

An accommodation maker of a note is liable to one to whom it was indorsed in payment of an antecedent debt, the use of the note not having been restricted by the maker. English v. Schlesinger, 55 Misc. Rep. 584, 105 N. Y. Supp. 989. So, also, when indorsed as collateral security for a debt. Many, Blanc & Co. v. Krueger, 153 Ill. App. 327, S. C. sec. 25.

Where the defendant, as co-maker with her husband, signed a note which was taken in payment of a bill for groceries, it was immaterial whether she was personally liable for the groceries or not, since the payee could enforce the note against her as accommodation maker, he being a holder for value within the meaning of section 29. Wilbour v. Hawkins, 38 R. I. 119, 94 Atl. 856, S. C. sec. 25.

A married woman made a note to pay for labor and materials used in the construction of houses by her husband on her property. *Held*, that she was not an accommodation maker. Brayer v. Edell, 163 N. Y. Supp. 989.

An accommodation maker is liable to a holder in due course, although the principal maker may not be liable because of his infancy. Hodgins v. N. W. Finance Co., 46 Okla. 95, 148 Pac. 717.

An accommodation indorser is in effect a surety and may set up usury as a defense. In an action brought upon a note on which enough usurious interest had been paid to discharge it, the action was settled by defendant indorser giving another note for the amount claimed. *Held*, that this note was without consideration, the plaintiff knowing that sufficient usury had been paid to discharge the original note, so that the action on it was not brought in good faith. Osborne v. Frederick, 134 Mo. App. 449, 114 S. W. 1045.

The plaintiff gave to her attorney a check for a sum of money to be invested for plaintiff. The attorney deposited the check to his own credit and used the money. Shortly afterwards the attorney procured from defendant for the attorney's accommodation a judgment exemption note with no date and no name as payee, the attorney stating that he needed the money to pay insurance premiums. After the attorney's death this note was found among his papers with the name of plaintiff written thereon as payee in the attorney's handwriting, and was delivered by his partner to plaintiff. *Held,* that defendant was liable to plaintiff on the note. The N. I. L. was not cited. Wolfgang v. Shirley, 239 Pa. 408, 86 Atl. 1011.

One who indorses a note for the accommodation of the payee is not liable thereon to the payee, although he may be indebted to the payee. If he signed upon the representation and with the understanding that he was only an indorser for accommodation of the payee, it is immaterial whether the maker who secured defendant's signature was authorized by the payee to make such representation. Cox v. Heagy (Mo. App.), 184 S. W. 494.

A plea by an indorser that he was acting as agent of the plaintiff in allowing his name to be used as payee and in indorsing the note to plaintiff, that defendant had no interest in the note and received no consideration for his indorsement, shows that defendant indorsed for the accommodation of plaintiff and states a good legal defense. Ladd v. Ardmon State Bank, 43 Okla. 502, 143 Pac. 170.

The maker of a note sued the payee for cancellation of the note on the ground that it was without consideration and made merely to accommodate the payee. *Held*, that the plaintiff must prove these allegations by the preponderance of the evidence. The N. I. L. was not cited. Fisher v. Rice Growers Bank, 122 Ark. 600, 184 S. W. 36.

Where it was agreed between the maker and the payee of a note that each should receive one-half the proceeds of the discount and pay one-half of the note, the maker was not an accommodation maker. The N. I. L. was not cited. Reyburn v. Queen City Savings Bank & Trust Co., 171 Fed. 609, 96 C. C. A. 373.

Plaintiff was payee of a note taken for bricks sold to the maker through defendant, who demanded his commission on the sale. Plaintiff refused to pay until the maker paid for the bricks unless defendant would indorse the note, which defendant did and was paid his commission. The note was discounted by a bank and dishonored and notice given to defendant. Plaintiff took up the note and sued defendant on it. A verdict was directed for the plaintiff. *Held* error, that whether defendant's indorsement was for plaintiff's accommodation was a question for the jury. Also, that neither the promise to pay a debt nor its subsequent payment was "value" within the meaning of section 29. Also that the words "value therefor," in section 29, mean value for the negotiable instrument, not value for the use of the name, and that one may be an accommodating party although he is paid something for the use of his name. Morris County Brick Co. v. Austin, 79 N. J. L. 273, 75 Atl. 550.

Knowledge of an indorsee for value that the note was given for the accommodation of the payee is not a defense to an action by the indorsee against the accommodating maker. Nor is an agreement between the payee and maker, that the note should be deposited in a bank as collateral security for advances to be made to the payee (and which were made) and that the bank should hold and not negotiate the note, although the indorsee of the bank had knowledge of the agreement. The bank being a holder in due course could transfer its rights to the plaintiff. Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. sec. 56.

Witteman v. Glass, 117 N. Y. Supp. 940, seems to hold, contrary to section 29, although the court does not cite the section, that knowledge that the instrument was for accommodation would defeat it even where plaintiff gave value for it. The plaintiff had materially altered the note and this was sufficient reason for denying recovery even according to the original tenor. (See section 124.)

This section has not changed the law of New York that an accommodation note transferred by the accommodated payee at a greater discount than the legal rate is unenforceable by the transferee. Strickland v. Henry, 66 App. Div. 23, 73 N. Y. Supp. 12;[1] Bruck v. Lambeck, 63 Misc. Rep. 117, 118 N. Y. Supp. 494 (transfer by accommodated maker), S. C. sec. 66; Simpson v. Hefter, 42 Misc. Rep. 482, 87 N. Y. Supp. 243; Sabine v. Paine, 166 App. Div. 9, 151 N. Y. Supp. 735, affirmed 223 N. Y. 401, 119 N. E. 849, S. C. secs. 55, 57, 66; but Kennedy v. Heyman, 167 N. Y. Supp. 311, S. C. sec. 55, 57, is *contra*, where the transferee did not know that the note was made for accommodation of the payee. *Cf.*, also, Schlesinger v. Kelly, *infra*, sec. 55.

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[1] The judgment in this case was reversed on the ground that the case should have been given to the jury to determine whether the note was accommodation paper. Strickland v. Henry, 175 N. Y. 372, 67 N. E. 611.

The payee of a raised check asked plaintiff, a depositor in a drawee bank, to introduce him to the bank. Plaintiff asked the teller if the check was good, to which he answered, "Perfectly, I believe." At the request of the teller the plaintiff indorsed the check and the bank paid it. Upon finding that the check was raised, the bank deducted the full amount of the check from plaintiff's account. Plaintiff sued the bank. *Held,* that plaintiff was an accommodation indorser, and, as such, liable to the bank, but only for the difference between the original amount and the raised amount. Smith v. State Bank, 54 Misc. Rep. 550, 104 N. Y. Supp. 750. *Sed quaere* whetner plaintiff was liable at all? The drawee bank was not a holder for value under section 29. See Farmers' Bank v. Bank of Rutherford, *infra,* sec. 66 Nor did plaintiff receive the money or mislead the banker. He only identified the payee.

The possession and negotiation by the maker of a note with the indorsement of the payee imports that the indorsement was for accommodation, and neither section 29 nor section 22 give power to a corporation to make accommodation indorsements. Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. Supp. 355.

As a rule, corporations have no power to bind themselves as accommodation parties, so that the holder has the burden of proving that he became a holder for value and without notice that the corporation was an accommodation party. Durbrow v. Swedish Iron & Steel Corp., 95 Misc. Rep. 160, 158 N. Y. Supp. 701; Abbott v. Le Prevost, 166 App. Div. 40, 151 N. Y. Supp. 616. The N. I. L. was not cited in these cases.

A manufacturing corporation has no power to bind itself as an accommodation party. Therefore in such a case the plaintiff must show both that he paid value and also that he did not know of the accommodation character of the instrument. Nat. Bank v. Snyder Co., 117 App. Div. 370, 102 N. Y. Supp. 478; Bradley Engineering Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170, S. C. sec. 119. *Cf., In re* Troy & Cohoes Shirt Co., *infra,* sec. 56.

If a corporation having general power to issue and to indorse negotiable paper for its own benefit in the course of its business, indorses for the accommodation of another, the corporation will be presumed to have acted within the scope of such general power and will be liable on its indorsement to a holder in due course. Cox & Sons Co. v. Northampton Brewing Co., 245 Pa. 418, 91 Atl. 859, Ann. Cas. 1916A, 86, S. C. sec. 56. It is often said that a corporation has no power to execute negotiable paper for accommodation and yet is liable on such paper to a holder in due course. It seems more proper to say that when the corporation has general power to execute negotiable paper, the issue of such paper for accommodation is an abuse and not a lack of power, and therefore, when the paper is issued without authority, the right of the holder to recover depends on whether he was ignorant of the fact that the paper was for accommodation and is otherwise a holder in due course.

The treasurer of a manufacturing corporation has no implied power to make a promissory note in its name unless it is expressly given by the by-laws or by a resolution of the directors, or such facts appear and are relied on that authority may be presumed from custom and usage acquiesced in by the corporation. Therefore, if the treasurer make a note in the name of the corporation without express authority for the accommodation of another and no such custom or usage is shown, the note is not enforceable, even in the hands of a holder in due course. The N. I. L. was not cited. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 105 N. E. 210. See other corporation cases under section 56, *infra*.

At the solicitation of the cashier of a bank and to make good an overdraft by a customer of the bank, defendant, without receiving any consideration, gave a check to pay the overdraft. *Held,* that the customer, not the bank, was the accommodated party, and that defendant was liable on the check, even though the cashier knew that the defendant received no consideration for the check. Section 29 N. I. L. is a codification of the common law. Neal v. Wilson, 213 Mass. 336, 100 N. E. 544.

Defendant gave a note to a bank for overdue interest on the note of another person held by the bank so as to enable the bank to pass the inspection of the bank examiner, and the interest was credited on the other note. *Held,* that the accommodation was for the maker of the other note, not for the bank, and that defendant is liable on his note. Skagit State Bank v. Moody, 86 Wash. 286, 150 Pac. 425, L. R. A. 1916A, 1215.

The note is not invalidated by an oral agreement that the note was to be returned to the maker after the examination by the bank, since the fraud was in the collateral oral understanding, not in the note or the consideration. *Ib.*

Defendant, without receiving value therefor, indorsed a note to a bank for the purpose of complying with a requirement of the bank that the maker in renewing a former note should give a note with another name on it. *Held,* that defendants indorsement was made for the accommodation of the maker and not of the bank. Nalitzky v. Williams, 237 Fed. Rep. 802, 151 C. C. A. 44, S. C. sec. 120-6.

A bank wished to lend a customer, but had already lent him as much as the law permitted, and therefore induced defendant to give his note for the amount, promising to hold him harmless. *Held,* that in legal contemplation the borrower, not the bank, was the accommodated party. That the oral agreement to hold defendant harmless was not admissible. Nor could defendant be permitted to escape liability on the ground that he gave the note in order that the bank examiner might believe it to be an asset of the bank, since the bank had in fact given value. German-American State Bank v. Watson, 99 Kan. 686, 163 Pac. 637, S. C. sec. 119.

The payee accommodation indorser of a note may buy the note of the holder and sue the maker thereon. Also, if he has been forced to pay the note, he has a right of action against the maker

on an implied contract of indemnity, and may sue thereon within six years after the payment, although an action on the note may be barred, because more than six years have elapsed since its maturity. Blanchard v. Blanchard, 201 N. Y. 134, 94 N. E. 630.

A bank, holding notes indorsed to it by the payee, knowing before the bank acquired them that the notes had been made by defendant for the payee's accommodation, and which, after the notes were due, failed to apply to their payment the payee's deposit, which was sufficient to pay the notes, thereby discharged the accommodation maker. Tatum v. Commercial Bk. & Trust Co., 193 Ala. 120, 69 So. 508, L. R. A. 1916C, 767, S. C. sec. 119.

An accommodation note may be negotiated after maturity even though it be the first negotiation and to one having knowledge of the accommodation so as to make the accommodation maker liable. Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996;[1] Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254, S. C. sec. 52, *semble*.[2]

Sed quaere, whether it is not the business view, that there is an understanding that the accommodated party shall take care of the paper at maturity, which would be inconsistent with a right in the accommodated party to negotiate it after maturity?

It is submitted that these cases are contrary to the weight of American authority[3] and not justified by the statute, but, that, if they are right under the statute, then the statute ought to be amended.

The question is so important to the business world as to seem to justify the repetition here of part of an article in which the subject is discussed.[4]

"Section 29 should be amended by substituting the words 'one who is in other respects a holder in due course' for the words 'a holder for value,' so that the section will read as follows:

'Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to *one who is in other respects a holder in due course*, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.'

"It is well settled, and rightly so, that knowledge of the fact that a party to a negotiable instrument has signed it for the

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[1] See this case criticised in 57 U. of P. Law Rev. 662.

[2] This case cites only the English cases and a few American cases, of which Harrington v. Dorr, 3 Robt. 275 had been expressly overruled on error, *sub nomine* Chester v. Dorr, 41 N. Y. 279, and Davis v. Miller, 14 Gratt 1, had been strongly disapproved of in Cottrell v. Walkins, 89 Va. 801. The case is criticised in 18 Harvard Law Rev. 615.

[3] 2 Ann. Cas. 256.

[4] Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law. Rev. 493, 494-500.

accommodation of another is no defense as against one to whom it has been negotiated for value before maturity, for by such negotiation the very object of the signing has been accomplished. When the accommodating party signed the instrument his purpose was to lend the use of his name to enable the accommodated party to obtain money, goods, or credit, and when that has been done by the negotiation of the instrument, it would not only be unjust but wholly contrary to the intention of the parties to permit the accommodating party to defend on the ground of no consideration as between himself and the party to whom he lent the use of his name.

"It is also settled that when an accommodation instrument has been paid at maturity by the accommodated party, it can not be again negotiated after maturity even to a purchaser for value without knowledge of its accommodation character so as to hold the accommodating party, although there is an English case which implies the contrary, provided a new stamp is put upon the instrument to satisfy the requirements of the English Stamp Act.[1] But, when the first negotiation of an accommodation instrument takes place after maturity, a different question arises upon which there is a conflict of authority in this country, some jurisdictions following the English cases which make no difference between a first negotiation after maturity and a first negotiation before maturity, as regards the liability of the accommodating party, while other American courts repudiate the English cases as not in accord with mercantile understanding.

"Two of the judges in the last[2] of the three cases which established the English rule decided the case only on the authority of the two earlier cases[3] and expressed doubt of the correctness of the rule. In this country the earliest cases followed the English courts with little or no consideration.[4] These cases were subsequently overruled.[5] But in the meantime, some other American courts had adopted the English rule upon the authority of the English cases and the two early New York cases since overruled. Some other American courts even after the overruling of these cases continued to cite them, apparently without being aware that they had been overruled. In one such case[6] the court also relied on and quoted from the decision of the lower court in Chester v. Dorr,[7] without noticing the fact that the Court of Appeals had reversed the lower court.

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1 Lazarus v. Cowie [1842], 3 Q. B. 459.

2 Sturtevant v. Ford [1842], 4 M. & G. 101.

3 Charles v. Marsden [1808], 1 Taunt. 224; Stein v. Yglesias [1834], 3 Dowl. P. C. 252.

4 Brown v. Mott [1811], 7 Johns. (N. Y.) 361; Grant v. Ellicott [1831], 7 Wend. (N. Y.) 227.

5 Chester v. Dorr [1869], 41 N. Y. 279.

6 First Nat. Bank v. Grant [1880], 71 Me. 374.

7 *Sub nomine* Harrington v. Dorr [1865], 3 Rob. (N. Y.) 275, 283.

"On the other hand, other jurisdictions in this county have repudiated the English rule and have held that an accommodation instrument negotiated for the first time after maturity can not be enforced against the accommodating party even though the purchaser paid value for the instrument and without knowledge of its accommodation character.[8]

"The American cases which refuse to adopt the English rule proceed upon the theory that when an accommodation instrument is given, it is the expectation and understanding of the parties that the accommodated party shall take care of it at maturity. It is submitted that this is the merchant's view of the case and that such view is entirely inconsistent with the idea that the instrument may be negotiated for the first time after maturity.

"Again, the accommodating party should be entitled to pay his note according to its terms, that is, at maturity, in case it is not taken care of by the accommodated party, and he may be seriously injured by not having that opportunity. At the time of maturity, the accommodated party may have property on which the accommodating party can make an attachment or execution against the accommodated party, while at the time the note is negotiated or at the time when the accommodating party is called upon to pay it, it might be impossible to recover anything from the accommodated party.

"The English rule involves the possibility that the instrument may be negotiated for the first time years after it has been signed, and after the accommodating party has wholly forgotten about it, for, not having received notice at its maturity, he would naturally think, and would be entitled to think, that if negotiated, it had been taken care of by the accommodated party, or that it had never been negotiated. Yet, according to the English rule, he would be liable upon it, if it should be negotiated at any time within the statute of limitations (from six to fifteen years according to the jurisdiction) and suit be brought on it within that period. This would certainly be shocking to any business man.

"When a man lends the use of his name to another by signing a bill or note payable at a certain time, it seems in accord with common sense to interpret the fixing of a definite time for payment as meaning an intention to limit the use of the name for the time mentioned in the instrument. This is true not only of the maker or acceptor but the conclusion is irresistible in the case of an accommodation drawer or indorser, for here the very terms of his contract are to pay if the instrument is presented at maturity to the party primarily liable and due notice of dis-

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[8] A collection of English and American cases can be found in the article by Professor Hening, 59 U. of P. Law Rev. 471, 486, n. 46-48. (To which may be added Seyfert v. Edison, 45 N. J. Law 393; Mackay v. Holland, 4 Metcalf 69; Sears v. Moore, 171 Mass. 514, 50 N. E. 1027; Whipple v. Crehore, 8 La. 540, and Cottrell v. Watkins, 81 Va. 1, strongly disapproving the English cases, and Davis v. Miller, 14 Grat. 1)

honor is given to the drawer or indorser. An accommodation drawer or indorser is entitled to the same diligence on the part of the holder as if the instrument had been drawn or indorsed for value; that is, he is entitled to have the instrument presented at maturity to the party primarily liable and due notice of its dishonor given to him.[9] To say that the drawer or indorser is liable upon an instrument negotiated for the first time after its maturity is absolutely inconsistent with the contract of the drawer or indorser because the instrument in such case is not and can not be presented for payment at maturity.[10] If the English courts had had to face this question, they could hardly have argued as they did in the cases which established the English rule. In all those cases, the defendant was an accommodation acceptor, except one, and there he was acceptor of one instrument and maker of another.[11] The writer's view as to the understanding of business men has been confirmed by consultations with a number of bankers, who were unanimous in their opinions.

"The Supreme Court of Wisconsin, in a recent case,[12] has held that under section 29 of the Negotiable Instruments Law, an indorsee who pays value for an accommodation note, with knowledge of the accommodation, may recover against the accommodating maker, even though the negotiation was the first one and was after maturity, and the learned author of an able article commenting on certain sections of the Negotiable Instruments Law,[13] upholds the judgment of the Supreme Court of Wisconsin as to the construction of the statute.

"This construction of section 29 is based chiefly on the contrast between the use of the phrase 'holder for value' in section 29, with the phrase 'holder in due course' used in section 28. There is force in this argument, but it leads to absurd and unjust results, for the effect of it is to dispense with the necessity of the holder being a holder in due course in any respect except as to the giving of value. If the argument is sound, then the holder for value of accommodation paper occupies a position superior to that of any other purchaser of negotiable paper, since there is no other requirement for his recovery except that he be a holder for value. He will not be subject to any of the conditions prescribed by section 52 except that he shall have given value for the instrument.

"If the Supreme Court of Wisconsin is right, then any one who pays value for an accommodation instrument will be able to recover upon it even if the instrument was not complete and regular upon its face. It might have been obtained by fraudulent representations or by threats or undue influence. It might have been given upon an illegal consideration, *e. g.*, given to effect a viola-

[9] See I Am. & Eng. Encyc. Law and Practice 526, note 23, for a large number of cases, English and American, in support of this proposition.

[10] Chester v. Dorr [1869], 41 N. Y. 279.

[11] Parr v. Jewell [1855], 16 C. B. 684.

[12] Marling v. Jones [1909], 138 Wis. 82, 119 N. W. 931.

[13] Professor Hening in 59 U. of P. Law Rev. 471, 532.

tion of the liquor law or to furnish a house of prostitution or to aid in a burglary or a murder. It might have been signed in blank with an agreement that it should be filled up for a certain sum, and yet be filled up by or in the presence of the transferee for a larger sum.

"In all these cases under the interpretation of the Wisconsin court, the purchaser for value, although cognizant of the conditions under which the paper was executed, is entitled to recover because he is a holder for value and need not be a holder in due course.[14] Again, an agreement between the accommodated party and the accommodating party that the instrument should not be negotiated after maturity would be no bar to recovery, even though such agreement was known to the purchaser after maturity. Even in the English cases[15] and all the American cases except one,[16] which adopt the English rule, such an agreement would be an equity attaching to the instrument in case the first negotiation was after maturity, but if the transferee need not be a holder in due course, he would not be affected by this agreement provided only that he hold for value. If it was really intended to make an accommodation note fully negotiable after maturity so as to cut off the defense of the accommodation party, why was it provided in section 58, which is not in the Bills of Exchange Act, that

> 'In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable?'

This provision is so absolutely irreconcilable with the interpretation put on section 29 by the Wisconsin court as to justify the belief that the phrase 'holder for value' was used in section 29 without full appreciation of the possible inference from such use.

"It may be urged that the foregoing argument tends to show not that an amendment of section 29 is necessary, but merely that the construction of the section by the Wisconsin court is erroneous. But when not only a Supreme Court, but also a learned teacher and writer interpret the section in the same way, is it not prob-

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[14] But see Greely, Uniform Negotiable Instruments Law 269, *contra*.

[15] Charles v. Marsden [1808], 1 Taunt. 224; Stein v. Yglesias [1834], 3 Dowl. P. C. 252; Sturtevant v. Ford [1842], 4 M. & G. 101; Parr v. Jewell [1855], 16 C. B. 684.

[16] In Naef v. Potter [1907], 226 Ill. 628, 80 N. E. 1084, a case upon an instrument made before the adoption of the Negotiable Instruments Law, the court without citing any cases on the point, held that the transferee after maturity, with knowledge of the fact of accommodation, but without knowledge of the agreement not to negotiate the instrument after maturity, could nevertheless recover against the accommodating party. It would now be otherwise in Illinois, since section 29, as adopted in Illinois, has an additional clause which restricts the transfer after maturity to cases where there is proof that "a transfer after maturity was intended by the accommodating party." But in other States, which have not so changed section 29 before adopting the act, such agreement would be no defense even if known to the person to whom the instrument is negotiated.

able that other courts will follow their lead? It is submitted, therefore, that it is the part of wisdom to remove all doubt by an amendment which will prevent the possibility of a construction which produces a result so contrary to mercantile understanding, and which will lead to such mischievous consequences as have been above described."

"In Cottrell v. Watkins, 89 Va. 801, 817, another unfortunate consequence of the doctrine of such cases as Marling v. Jones was pointed out. The court said: 'The doctrine itself, so far from upholding the integrity and ready circulation of commercial paper, strongly tends to suppress a large class of such paper, and to ruinously cripple commercial transactions. Accommodation paper, without consideration, is a most important factor in the commercial world. Such paper crowds every avenue of commercial enterprise. Why, then, subject the makers, indorsers, or acceptors of such paper to this species of outlawry, by denying to them the defenses guaranteed to the makers, indorsers and acceptors of negotiable paper for value?' "

If the Wisconsin court's view of the statute prevails, and the statute is not amended, the risk of lending one's name to help a friend in need will be so serious as in great measure to bar such acts of kindness.

If an acommodation note has once been negotiated and paid at maturity it is extinguished and can not be re-issued so as to bind the accommodating party. A repeated use of the instrument is not within the authority given. Comstock v. Buckley, 141 Wis. 228, 124 N. W. 414, S. C. secs. 58, 119; Cominsky v. Coleman, 114 N. Y. Supp. 875, not citing the N. I. L.

ARTICLE III.

NEGOTIATION.

Sec. 30. What Constitutes Negotiation.

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Davis v. First Nat. Bank of Blakeley, 192 Ala. 8, 68 So. 261, S. C. sec. 9-5; Jones v. Bell (Ala.), 77 So. 998; R. J. & B. F. Camp Lumber Co. v. State Savings Bank, 59 Fla. 455, 51 So. 543; Sublette v. Brewington, 139 Mo. App. 410, 122 S. W. 1150; Miners & Merchants Bank v. St. Louis Smelting, etc., Co. (Mo. App.),

178 S. W. 211, S. C. sec. 23; Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187; Emerson-Brantingham Co. v. Brennan, 35 N. D. 94, 159 N. W. 710; Nat. Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63, S. C. sec. 52; Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, S. C. secs. 18, 49.

It has been suggested[1] that section 30 should be amended so as to read: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery, *unless the only or last indorsement upon it is a special indorsement. In that case,* or if the instrument is payable to order it is negotiated by the indorsement of the holder completed by delivery." When a holder of an instrument originally payable to bearer, or made so by indorsement in blank, indorses it specially and delivers it, the title is in the special indorsee. Thereafter no one ought to be able to acquire the legal title by delivery alone, and so take the instrument discharged of the rights of the special indorsee, although such was formerly the law. But this was changed by section 9-5. Chalmers, speaking of the English section from which section 9-5 was copied, said: "This subsection alters the law. It was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank."[2] But the old rule was restored in the Negotiable Instrument Law by section 40, which is inconsistent with section 9-5 and which ought to be repealed.[3]

A learned writer[4] has suggested that the amendment proposed seems, at first sight, confusing, and that the object proposed could be better attained by adding at the end of the first sentence of section 8 (reading "the instrument is payable to order where it was drawn payable to the order of a specified person or to him or his order") the words "or where, the instrument being on its face payable to bearer, the last or only indorsement thereon is special." One may agree with the learned writer that the object can be as well, if not better, attained, by the amendment suggested by him, but yet differ with his opinion that "the proposed amendment would seem to be of small importance." It is submitted that it is of considerable importance to business men that they should be able to indorse bearer paper in such a manner as to put the title in another and protect the indorsee against loss, if the instrument should chance to be lost or stolen.

Under this section and section 191 an instrument is negotiated when it is delivered to the payee or to an indorsee. "Negotiated"

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[1] Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Rev. 502.

[2] Chalmers, Bills of Exchange, sec. 8.

[3] See discussion under section 40, *infra*, also Brannan, 26 Harvard Law Rev. 500.

[4] Greeley, The Uniform Negotiable Instruments Law, 10 Ill. Law. Rev. 270.

is not confined to transfer after delivery to the payee. Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B, 144; *Ex parte* Goldberg & Lewis, 191 Ala. 356, 67 So. 839, L. R. A. 1915F, 1159; Nat. Bank of Commerce v. Farmers & Merchants Bank, 87 Neb. 841, 843, 128 N. W. 522, S. C. *infra*, p. 131; Lloyd's Bank v. Cooke [1907], 1 K. B. 794, 808, per Fletcher Moulton, C. J. *Contra*, Long v. Shafer, 185 Mo. App. 641, 171 S. W. 690. See notes to sections 14 *supra*, pp. 49 *et seq.*, and 52 *infra*, pp. 163 *et seq.*, for discussion.

A promissory note payable to the X Company or bearer was assigned by separate writing and also delivered to plaintiffs. *Held*, a negotiation so as to constitute plaintiffs the holder. Davis v. Florey (Ala. App.), 77 So. 413.

Code 1907, sec. 2489, requires actions on promissory notes to be brought in the name of the person holding the legal title. Since section 30, N. I. L., requires indorsement of an instrument payable to order to a negotiation thereof, a complaint on such an instrument is not sufficient which merely alleges that the note had been transferred to plaintiff for value without alleging the method or mode of the transfer. Wilson v. Weaver (Ala. App.), 77 So. 238.

A denial that a note was ever duly negotiated or discounted for value is not demurrable. It is a statement of fact, not a conclusion of law. Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49, S. C. secs. 26, 52.

When the indorsement of a negotiable instrument payable to order is denied, plaintiff must prove the indorsement. This is not done by the statement of a witness that the instrument was "negotiated" to the plaintiff. Capitol Hill State Bank v. Rawlins Nat. Bank, 24 Wyo. 423, 160 Pac. 1170.

An allegation that the payee "indorsed and transferred" is a sufficient allegation of delivery. *Semble*, that it is enough to allege that he indorsed the note. Louisville Co. v. International Trust Co., 18 Colo. App. 345, 71 Pac. 898.

It is enough to allege indorsement which imports delivery. Sherrill v. Merchants, etc., Bank (Ala.), 70 So. 723, S. C. sec. 52; Williams v. Peninsular Grocery Co. (Fla.), 75 So. 517, S. C. secs. 66, 111, 120-6 is *contra* and wrong. In this case the court overlooked section 191 which defines "indorsement" to mean "an indorsement completed by delivery."

A note made by defendant to his own order, and indorsed by him in blank, was acquired by plaintiff by delivery from an intermediate holder. *Held*, that plaintiff was the legal holder of the note and could maintain an action thereon without the indorsement of the person from whom plaintiff bought the note. Davis v. First Nat. Bank, 192 Ala. 8, 68 So. 261, S. C. sec. 9-5.

A note indorsed in blank is payable to bearer and it is no defense that it was not indorsed by the party from whom plaintiff bought it. Dominion Trust Co. v. Hildner, 243 Pa. 253, 90 Atl. 69, S. C. sec. 70.

The holder of a note, payable to order, before its transfer, is the payee, and not one who claimed to have possession of it as agent of

the payee. Scotland County Nat. Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539, S. C. sec. 19.

A declaration which fails to allege whether the note sued upon was payable to order or to bearer, or how it was transferred to the plaintiff, is insufficient to sustain an action on the note by one not the payee. German Am. Nat. Bk. v. Lewis, 9 Ala. App. 352, 63 So. 741, S. C. secs. 52, 59.

The cashier of a bank sold certain notes, indorsed in blank by the payee, to defendant who deposited them in his private box in the bank. The cashier had a key to the box and was authorized by defendant to collect the notes. The cashier abstracted the notes from the box and sold them to plaintiff, a *bona fide* purchaser. Plaintiff deposited them in his private box, authorizing the cashier to collect them. When the notes were due the cashier got new notes from the maker, payable to the order of defendant, forged defendant's indorsement and deposited the notes in plaintiff's box where they were found after the suicide of the cashier. *Held,* that there was sufficient delivery of the original notes to plaintiff to complete a valid transfer, whether they were deposited in his box by him or by the cashier, and that plaintiff was entitled to impress a trust on the new notes taken in place thereof. The N. I. L. was not cited. Irwin v. Deming, 142 Iowa, 299, 120 N. W. 645.

B drew a check payable to the order of L and had L indorse the check to the order of the plaintiff and delivered the check to L with instructions to deliver it to the plaintiff. This was not done, but some one subsequently forged the plaintiff's name as indorser and transferred the check to G who deposited it to his account in the defendant bank, which collected it from the drawee bank. *Held,* that the plaintiff obtained title to the check by the delivery to L and the subsequent indorsement being a forgery, could recover the proceeds from the defendant. Ingraham and Laughlin, JJ., dissenting. Wolfin v. Security Bank of N. Y., 170 App. Div. 519, 156 N. Y. Supp. 474, affirmed without opinion in 218 N. Y. 709.

A note payable to X and Y was indorsed specially by the payees to the A bank and by the A bank specially to the B bank, both indorsements being for the purpose of collecting the note. The latter bank presented it for payment and upon its dishonor returned it to the A bank. Thereafter, the note being in the hands of plaintiff who was cashier of the A bank, the payees assigned an interest in the note to G and by the same writing authorized plaintiff to collect the note and pay G out of the proceeds the amount assigned to him. *Held,* that plaintiff held the title to the note by appointment of the payees as trustee to collect and apply the proceeds and can maintain an action thereon against the makers. Carter v. Butler, 264 Mo. 306, 174 S. W. 399, Ann. Cas. 1917A, 483, S. C. sec. 28.

An indorsement of a note signed by the payee is not qualified by a subsequent guaranty of payment written on the back of the note and also signed by the payee, and upon delivery legal title

passes, and the holder may maintain an action thereon against the maker. McKee v. District Nat. Bk., 38 App. Cas. (D. C.) 465.

A note was made payable to the order of "Wonder Stock Powder Co." The only indorsement was "James J. Doty, Prop." The plaintiff testified that Doty was sole owner of the company, but it did not appear whether the payee was a corporation or a trade name used by Doty. The defendant introduced evidence of fraud in procuring the execution of the note. *Held*, that plaintiff could not be a holder in due course. First Nat. Bank of Shenandoah v. Kelgord, 91 Neb. 178, 135 N. W. 548.

But if it had been shown that the name of the payee was used by the indorser as a trade name, such indorsement would have passed the title and plaintiff, if he was a *bona fide* purchaser, would have been a holder in due course. The N. I. L. was not cited. Gardner v. Wiley, 46 Ore. 96, 79 Pac. 341.

The plaintiff made a note to the order of X, who was to negotiate it for plaintiff's benefit. About three months later after several unsuccessful attempts to negotiate the note, plaintiff asked X for the note and was falsely told that it had been destroyed. About six months thereafter, but before its maturity, X delivered the note, without indorsing it, to defendant as collateral for a loan to himself. Plaintiff sued to restrain defendant from disposing of the note and for its cancellation. *Held*, that the relief should not be granted, that although defendant was not a holder in due course under the Negotiable Instruments Law, yet plaintiff was liable to him on the ground that X was his agent to borrow money for him. Sublette v. Brewington, 139 Mo. App. 410, 122 S. W. 1150. *Sed quaere* whether X had authority to transfer the note otherwise than by indorsement? Moreover, the authority clearly seems to have been terminated when plaintiff was informed that the note had been destroyed. See 23 Harvard Law Rev. 479.

The purchasers of the property of a traction company, pending the receipt of the purchase money from another city, executed notes for the amount to a bank which issued a cashier's check payable to the order of the secretary of the traction company who indorsed it to the order of a trustee who indorsed it in blank. The notes and the check were pinned together and left in the custody of the bank. *Held*, that the cashier's check had not been negotiated. Seaman v. Muir, 72 Ore. 583, 144 Pac. 121.

A note given for railroad stock was indorsed by the payee to his principal whose money he held to be loaned on security, but the principal never saw the note, which was retained by the payee until his death. And the only knowledge which the principal had thereof was from entries in his pass book, his only transaction with the payee being a deposit of money to be loaned and the receipt of interest. *Held*, that there was no indorsement completed by delivery and that the principal had not the title to the instrument. Young v. Hayes (Iowa), 165 N. W. 391.

The payment of a check by the drawee bank is not a negotiation and does not make the bank a holder within section 30. The check is extinguished and can not be put in circulation again so

as to bind the drawer or indorsers. Aurora State Bank v. Hayes-Eames Elevator Co., 88 Neb. 187, 129 N. W. 279; National Bank of Commerce v. Farmers & Merchants Bank, 87 Neb. 841, 843, 128 N. W. 522, S. C. *supra*, p. 129.

Parol evidence is inadmissible to establish an oral agreement contemporaneous with the making of a negotiable instrument whereby it was not to be negotiated. The N. I. L. was not cited. Benton v. Sikyta, 84 Neb. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057 n.

Sec. 31. Indorsement—How Made.

The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.[1]

The Illinois Act adds "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

McKee v. District Nat. Bank, 38 App. Cas. (D. C.) 465, S. C. sec. 30; Commercial Security Co. v. Main Street Pharmacy (N. C.), 91 S. E. 298; First Nat. Bank v. McCullough, 50 Ore. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758, S. C. sec. 42; Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, S. C. secs. 18, 49.

Plaintiff must introduce evidence of the genuineness of an indorsement under which he claims. The N. I. L. was not cited. Whitman v. Fournier (Mass.), 117 N. E. 3.

There is nothing in the Negotiable Instruments Law which prevents the use of a rubber stamp in the indorsement of checks, drafts and notes. Flanders v. Snare, 37 Pa. Sup. Ct. 28.

Stamping the name of the payee on the back with a rubber stamp with his authority and with intent to indorse the instrument, is a valid indorsement, but the indorsement does not prove itself. The N. I. L. was not referred to on this point. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, S. C. sec. 49.

The indorsement of the name of the payee, a corporation, on the back of a note by a rubber stamp is a sufficient written indorsement where there is evidence that the indorsement was ratified by the

[1] "It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill without additional words is sufficient. An indorsement written on an allonge, or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognized, is deemed to be written on the bill itself." B. E. A. s. 32 (1).

officers of the corporation. American Union Trust Co. v. Never Break Range Co. (Mo. App.), 190 S. W. 1045.

Where the indorsement of a check by the payee is denied, it must be proved. Plaintiff does not prove the indorsement by the mere production of the check with the name of the payee on the back. Donahue v. Bank of America, 161 N. Y. Supp. 232; Congress Tucking Co. v. Alton Dress & Waist Co., 154 N. Y. Supp. 156, not citing the N. I. L.; Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803; Marks v. Munson, 59 Colo. 440, 149 Pac. 440, Ann. Cas. 1917A, 766.

Writing an indorsement on a mortgage which secured the note and was pinned to it, operates only as an assignment, especially where there was room on the note for an indorsement. Clark v. Thompson, 194 Ala. 504, 69 So. 925, *semble.*

A written agreement whereby the defendants, officers and directors of the X Company, agreed to be jointly bound to plaintiff bank on all obligations of said company, indorsed "by either one of us to the extent of $70,000," is not a contract of indorsement, but is enforcible as a primary liability. First Nat. Bank v. Doherty, 156 Ky. 386, 161 S. W. 211.

"I hereby assign this note over to X this Nov. 1, 1910," signed by the payee on the back of a negotiable instrument, is an indorsement by the weight of authority at common law, and is also an indorsement under the Negotiable Instruments Law. Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863, S. C. sec. 38; Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. secs. 1, 38.

The words, "For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due," written on the back of a note by the payee, are not an indorsement but a mere guaranty of payment, and the defendant maker is not cut off from any defenses he had against the payee. Neither the N. I. L. nor any of the cases under it were cited. Ireland v. Floyd, 42 Okla. 609, 142 Pac. 401, L. R. A. 1915C, 661.

Sec. 32. Indorsement Must Be of Entire Instrument.

The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.[1]

[1] The provision in the last sentence is not in B. E. A. See section 32 (2).

A complaint stating that the payee indorsed a half interest in a note to plaintiff states no cause of action at law. Berkley v. Muller, 164 App. Div. 351, 149 N. Y. Supp. 620.

So, also, an affidavit for attachment stating the same facts, is insufficient. *Ib.*

Plaintiffs, makers of a note secured by mortgage, paid the note at maturity to the payee, received the note and the mortgage with a release indorsed thereon. The register of deeds refused to accept the release for record because the payee before maturity of the note had by separate instrument assigned a third interest in the mortgage to a third person, which assignment had been recorded. Plaintiffs, without payment of the one-third to the third person on demand by him, sued the payee to recover one-third the amount of the note. *Held,* that plaintiffs could not recover. Their payment to the payee was rightful and discharged them. The assignment of a part was not a negotiation and the assignee was not a holder in due course. But plaintiff might in equity bring all parties into court and have a decree for cancellation of the mortgage. Offenstein v. Weygandt, 89 Kan. 739, 132 Pac. 991.

Plaintiff was a *bona fide* indorsee of a note, but X furnished one-half the consideration for the purchase and had one-half interest therein. The defense of the maker was fraud practiced by the payee in the procurement of the note and failure of consideration. *Held,* that the fact that plaintiff held a half interest in the note for X did not prevent plaintiff from recovering the full amount against the maker. Fleshman v. Bibb, 118 Va. 582, 88 S. E. 64.

Sec. 33. Kinds of Indorsement.

An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.[1]

The Arkansas Act has "instrument" instead of "indorsement" in the first line, an evident clerical error.

An allegation in a complaint to which was annexed the note sued on, that it was indorsed to the plaintiff, is sustained by showing that the note was indorsed in blank. It is immaterial whether plaintiff's ownership was derived through a special or a blank indorsement. Cleveland Co. v. Chittenden, 81 Conn. 667, 71 Atl. 935.

Sec. 34. Special Indorsement—Indorsement in Blank.

A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and

[1] The English Act omits the words "qualified or conditional." B. E. A. s. 32 (6).

the indorsement of such indorsee is necessary to the further negotiation of the instrument.[1] An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

In Massachusetts, the words "does not specify any indorsee" are substituted for the words "specifies no indorsee."

In Wyoming the word "made" is inserted between the words "be" and "payable."

Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182, 73 Pac. 873; Jerman v. Edwards, 29 App. D. C. 535, S. C. sec. 48; Miller v. Peoples Sav. Bank, 193 Mo. App. 499, 186 S. W. 547; Mackintosh v. Gibbs, 79 N. J. L. 40, 74 Atl. 708, S. C. sec. 66.

AMES: This section fails to define an indorsement, so as to settle the conflict on the question, as to whether such words as "I assign this note to B" or "I guarantee the payment of this note to B," is an indorsement creating liability as an indorser and giving a holder in due course a title free from equities.

BREWSTER: The liability of a party on a peculiar indorsement, which is outside of negotiability, must be settled by a court.

AMES: The very point in controversy is one of negotiability.

MCKEEHAN: Much would be gained by deciding what expressions constitute an indorsement. But Professor Ames does not show how it can be done by any sufficiently brief, accurate and comprehensive provision.

The legal effect of a blank indorsement can not be varied by parol. Torbert v. Montague, 38 Colo. 325, 87 Pac. 1145, S. C. sec. 82-3.

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[1] The last clause is omitted in the English Act. B. E. A. s. 34 (2), but see s. 34 (3), which reads: "The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement."

In an action against a first indorser of a promissory note, there is no fatal variance between an averment alleging an indorsement to the plaintiff, and proof of a note bearing a first indorsement in blank by the payee, a second indorsement, and a negotiation to the plaintiff by delivery by the maker, since a note indorsed in blank is negotiable by delivery, and the holder of a note indorsed in blank by the payee may strike out all subsequent indorsements and sue as indorsee under the blank indorsement. Howell v. Commercial National Bank, 40 App. Cas. D. C. 370.

A party in possession of a promissory note, indorsed in blank, may lawfully negotiate it by mere delivery and there is no obligation on the purchaser to require the indorsement of such holder, even though the holder is the president of the bank discounting the note. First Nat. Bank v. Gerli, 232 Pa. 465, 81 Atl. 540, distinguished. Lincoln Nat. Bank v. Miller (Pa.), 100 Atl. 269.

An indorsement in blank is not nullified by a guaranty following it and guaranteeing the payment of a greater rate of interest, and costs of collection, and waving demand and notice of nonpayment. Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068, S. C. secs. 38, 52-3. The N. I. L. was not cited on this point.

The payee of a check indorsed it, "Pay to the order of," leaving a sufficient blank between said words and his signature to write the name of the holder. *Held,* that the legal effect of an indorsement is a question of law for the court and not for expert testimony, and that the indorsement made the check payable to bearer and negotiable by delivery. State v. Hinton, 56 Ore. 428, 109 Pac. 24. *Cf.,* Tower v. Stanley, sec. 8-6 *supra,* p. 31.

Sec. 35. Blank Indorsement—How Changed to Special Indorsement.

The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.[1]

Davis v. First Nat. Bank of Blakeley, 192 Ala. 8, 68 So. 261, S. C. sec. 9-5; Jerman v. Edwards, 29 App. D. C. 535, S. C. sec. 48.

Sec. 36. When Indorsement Restrictive.

An indorsement is restrictive, which either—

1. Prohibits the further negotiation of the instrument, or

[1] "By writing above the indorser's signature a direction to pay the bill to, or to the order of, himself or some other person." B. E. A. s. 34 (4).

2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.[1]

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.[2]

AMES: Subsections 2 and 3 should be consolidated as follows: "An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person," because, since under section 37 the "agent of the indorser" has the right to sue in his own name, he is in truth a trustee.

BREWSTER: All agents are not technically trustees. The distinction is made to relieve the plaintiff from proving an actual trust.

MCKEEHAN: The section preserves an existing distinction, *e. g.*, an indorsement for collection has always been regarded as creating a mere agency which may be revoked at any time. Section 37 probably intended only a procedural change.

Bank of Tallassee v. Jordan (Ala.), 75 So. 930, S. C. sec. 52.

An indorsement for collection and remittance is a restrictive indorsement which creates the relation of principal and agent and the agent stands toward the principal as a trustee. The N. I. L. was not cited. Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, 90 Atl. 369.

An indorsement, "Pay to any bank or banker. All previous indorsements guaranteed," is not a restrictive indorsement. National Bank of Commerce v. Bossemeyer (Neb.), 162 N. W. 503, S. C. sec. 37.

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1 "An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be endorsed, 'Pay D only' or 'Pay D for the account of X,' or 'Pay D or order for collection.'" B. E. A. s. 35 (1).

2 "Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option." B. E. A. s. 8 (5).

But "Pay to any bank or banker" is held in Citizens Trust Co. v. Ward, 195 Mo. App. 223, 190 S. W. 364, citing other Missouri Appeals Cases but not the N. I. L., to be an indorsement for collection which does not transfer title, but it is inconsistently held that the bank to which the instrument is sent for collection may become the owner of it by merely sending the amount to the remitter without any agreement with the remitter to sell the note, and may then sue on it. Peoples, etc., Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102, is *contra* upon the last point.

In First Nat. Bank v. Weitzel, 239 Fed. Rep. 497, 152 C. C. A. 375, the court spoke of the indorsement of a note by a bank, "Pay to the order of any bank or banker. All previous indorsements guaranteed" as "that peculiar form of words which it appears without dispute is customarily used among banks for the purpose of forwarding for collection and not for the purpose of rediscount or sale," and it was held that this indorsement, with other circumstances, imposed upon the purchaser the duty of inquiry so that recovery could not be had upon the indorsement, being that of a bank which had no power to indorse for accommodation. The N. I. L. was not cited.

In Werner Piano Co. v. Henderson & Reese, 121 Ark. 165, 180 S. W. 495, notes made by the defendants were indorsed by the payees, before maturity, as follows: "Pay to the order of the First Nat. Bank for credit of account of Werner Piano Co." The plaintiff claimed that it bought the notes from the payee for value, before maturity, without notice of any defects in the title. It was held, that the indorsement was a restrictive indorsement, making the indorsee the agent of the indorser, that plaintiff had notice by this indorsement of defenses of the maker and therefore was not an innocent purchaser. The court made the mistake of failing to distinguish between an indorsement for the use of the indorser and an indorsement for the use of a third person. In this case the indorsement was for the use of plaintiff, and the bank, the indorsee, became, not an agent for the indorser, but a trustee for the plaintiff. Moreover, it is difficult to see how a restrictive indorsement gives notice to the indorsee of defenses of the maker against the payee-indorser. But it would be correct to say that if the indorsement had been made by the payee for his own use, the defense would be good against the indorsee, not because he had notice thereof, but because he was only the agent or trustee of the payee-indorser.

Sec. 37. Effect of Restricting Indorsement—Rights of Indorsee.

A restrictive indorsement confers upon the indorsee the right,—

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;(*a*)

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

The Illinois Act adds to subsection 2, "or except in the case of a restrictive indorsement specified in section 36—subsection 2—any action against the indorser or any prior party that a special indorsee would be entitled to bring," and substitutes for the words "his rights as such indorsee" in subsection 3 the words "the instrument," and adds to the end of subsection 3 the words, "specified in section 36—subsection 1—and as against the principal or *cestui que trust* only the title of the first indorsee under the restrictive indorsement specified in section 36—subsections 2 and 3 respectively."

AMES: Under clause 2 an indorser, even though for value, can not be sued by an indorsee in trust for a third person, *e. g.*, if A, the holder of a note, indorses "pay to B for use of C," B could not sue his indorser A even if A received value for his indorsement. This is unjust.

BREWSTER: Equity would take care of the case supposed.

MCKEEHAN: It is plain that the indorser in such a case should have a right of action against the indorser. How equity would take care of the case is not apparent. It has been suggested that the language of section 37-2 is used in a permissive and not in a restrictive sense. By this construction the indorsee in trust could sue his indorser.

Jerman v. Edwards, 29 App. D. C. 535, S. C. sec. 48.

(*a*) An indorsee for collection can sue in his own name, but he takes the instrument subject to all equities existing between his indorser and the maker. Payment by the maker to the indorser after the indorsement is a good defense, and parol evidence to show that the indorsee was actual owner of part of the note is inadmissible as tending to contradict the indorsement. Smith v. Bayer, 46 Ore. 143, 79 Pac. 497, 114 Am. St. Rep. 858.

An indorsee "for collection" can not hold the acceptor where the drawer paid the amount of the bill before maturity to the indorser and released the acceptor, although said indorsee has paid the amount to the indorser. Under section 35, Bills of Exchange Act, such indorsee gets no property in the bill. Williams, Deacon & Co. v. Shadbolt, 1 Cababe & Ellis, 529.

Sed quaere as to this case? It is true, that section 35 [1] defines a restrictive indorsement as one "which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof." But does this mean anything more than that the beneficial ownership does not pass? Section 35(2) gives the restricted indorsee the right to sue, for which legal title is necessary. The drawee's payment was to the *cestui* after the trust had ceased, for payment by the indorsee to the indorser should have that effect, and the acceptor ought not to be allowed to set up a release by the drawer since the bill was not given up or exhibited, and the acceptor therefore knew that it might be in the hands of a third person.

A check on the A bank was indorsed without restriction and deposited in the B bank, and credited to the depositor, with the understanding that it was deposited for collection only and to be charged back if not collected. *Held*, that the check remained the property of the depositor and no title passed to the B bank. Morris-Miller Co. v. Von Pressentin, 63 Wash. 74, 114 Pac. 912; American Sav., etc., Bank v. Dennis, 90 Wash. 547, 156 Pac. 559.[2] The N. I. L. was not cited in these cases.

But in Metzer v. Segall, 83 Wash. 80, 145 Pac. 72, S. C. sec. 26, it was held that an indorsee of a negotiable promissory note for collection can sue on it in his own name.

Where a check is deposited with a bank and the depositor checks against it with the understanding that, if the bank fails to collect the check the amount is to be charged back, the check remains the property of the depositor, and title does not pass to the bank, the bank's act in allowing the depositor to check against the paper being a mere gratuitous privilege. The N. I. L. was not cited. American Sav. Bank & T. Co. v. Dennis, 90 Wash. 547, 156 Pac. 559. It is submitted that this is erroneous and that the error, which is a common one, arises from the failure to distinguish between the legal title and the equitable title, or title as agent, or trustee, and title as owner. Whether the instrument be payable to bearer or is specially indorsed, the person to whom it has been delivered for collection, or on deposit, is in possession and he has the right to sue in his own name, for which title is necessary.

National Bank of Commerce v. Bossemeyer (Neb.), 162 N. W. 503, S. C. sec. 36, is *contra* to the preceding case. In this case

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[1] *Supra*, p. 137, n. 1.

[2] In these cases the result would have been the same if it had been held that the legal title passed to the bank, leaving the beneficial ownership in the indorser.

defendant drew a draft payable to the A bank, deposited it in that bank and was given credit therefor in his checking account. The A bank indorsed the draft, without qualification, and sent it to its correspondent, the plaintiff bank, which credited the amount to the A bank and sent the draft through its correspondent for collection from the drawee. Before the draft reached the drawee the A bank suspended, and the defendant notified the drawee not to pay the draft and collected the amount thereof from the drawee. The draft was protested and returned to plaintiff, which, as a holder for value, as defined by section 26, N. I. L., sued the defendant. Defendant testified that the draft was deposited in the A bank for collection only and claimed that the title and ownership remained in that bank. *Held,* that the better view is that the deposit of a check or draft in a bank with a general indorsement and the giving of credit for its amount to the depositor, in the absence of other evidence as to the intention of the parties, passes the title to the bank, and makes it a holder in due course, and the fact that the bank may charge back the amount if the draft is not paid does not affect the relation, even though there was a custom between the drawer and a bank, unknown to the plaintiff bank that drafts deposited in the bank were taken only for collection and that defendant was liable to plaintiff. Section 37, N. I. L., was not cited. But *semble* if the draft had been indorsed "for credit," "for account," "for collection and return," the indorsement would have been restrictive, showing on its face that the indorsee bank took it only as a collecting agent and not as a holder for value.

It has often been held that indorsements "for collection" or "for collection account" or "for deposit" or "for deposit and collection" do not pass the legal title to the indorsee. This is an error and arises from the fact that courts so holding fail to distinguish between the legal title to the instrument and the beneficial ownership thereof. The courts may well say that the title to the instrument remains in the indorser if they mean thereby only that he retains the beneficial ownership. But the legal title must be in the indorsee, otherwise he would not be able to sue on the instrument in his own name, as has been held in some of the very courts which hold that he has no title, nor would he be able to indorse the instrument to another to collect, as in the common case of an instrument drawn upon or payable at a distant bank which must often be transferred several times before it reaches the place of payment. An indorsement for collection does not destroy the negotiability of the instrument and it can be re-indorsed. Fawsett v. Nat. Life Ins. Co., 97 Ill. 11; Haskell v. Avery, 181 Mass. 106, 63 N. E. 15.

The truth is that indorsements of the kind specified are restrictive indorsements which pass the legal title but carry on their face notice that the immediate indorsee and all subsequent indorsees hold in trust for the indorser. 22 Harvard Law Rev. 150.

In Moore v. Hall, 48 Mich. 143, it was held that an agent to whom negotiable paper is indorsed for collection may sue thereon in his own name, and as the indorsement for such purpose passes the legal title in trust, the authority to collect is not revoked by the death of the owner.

In Freeman's Nat. Bank v. Nat. Tube Works, 151 Mass. 413, the court, speaking of indorsements for collection, said: "They purported to be made only for the purpose of collection on account of the owner, and they merely passed the legal title so far as to enable the indorsees to demand, receive and sue for the money to be paid."

In Haskell v. Avery, *supra*, p. 141, a note payable in Boston was indorsed for deposit in the National Bank of Florida to credit of E. J. M. It was held by Holmes, C. J., "There is no reason for denying that this indorsement gave the bank the legal title to the note * * * it does not seem to matter if the title was voidable in case the depositor should have seen fit to revoke his mandate, or the bank had returned the paper on a failure to collect * * * and the fact that the indorsement to the bank was restrictive, in the sense that it disclosed a trust, did not prevent the bank from passing the legal title subject to the trust to the Boston bank or person ultimately called upon to collect. This is in accordance with reason, and has the sanction of Massachusetts authority, as well as of other courts, and seems to be established as the law for future transactions by statute," quoting sections 36 and 37, N. I. L.

It followed that if the legal title was in the indorsee in the case of Smith v. Bayer, *supra*, p. 139, the maker ought not to have paid the indorser when the legal title and possession of the instrument was in another, even though the indorser had the beneficial ownership, because the fact that the instrument was not produced and surrendered should put the maker upon inquiry as to its whereabouts and as to the rights thereon of any person who might be discovered by inquiry to be the holder of the legal title. The indorsee here was a beneficiary of the trust upon which he held the legal title, as well as the indorser, and having both legal title and a beneficial interest, the indorsee could sue, even though the maker had paid his co-beneficiary. Payment to the indorser should discharge the maker only to the extent of the indorser's interest. The same comment can be made upon the case of William Deacon & Co. v. Shadholt, *supra*, p. 140, with even more force, since there the trust in favor of the indorser had been terminated.

One who holds a negotiable note as collateral for payment of a debt may sue thereon in his own name but not one who holds "for collection," because he is not "the party in interest," citing Abrams v. Caveton, 74 N. C. 523, a case decided prior to the adoption of the Negotiable Instruments Law. Third Nat. Bank v. Exum, 163 N. C. 199, 79 S. E. 498, *semble*. The court evidently overlooked section 37-2, N. I. L.

Sec. 38. Qualified Indorsement.

A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.[1]

The Michigan Act reads: "Such an instrument" instead of "such an indorsement," an evident error.

Oral evidence is not admissible to show an agreement between indorser and indorsee that the transfer was to be without recourse. The N. I. L. was not cited. Holt Mfg. Co. v. Brotherton, 91 Wash. 354, 157 Pac. 849.

The payee of a note who had indorsed it to plaintiff in blank can not, in an action thereon, set up a verbal agreement that the plaintiff was to stamp "without recourse" over his signature, as its effect woud be to contradict the contract evidenced by his blank indorsement. Lake Harriet State Bank v. Miller (Minn.), 164 N. W. 989.

In an action against the indorser without qualification, evidence of an oral agreement that his indorsement was to be without recourse as to him, is inadmissible. Section 68 has no application to such a case. Aronson v. Nuremburg, 218 Mass. 376, 105 N. E. 1056.

A note payable to the order of X was indorsed in the following order,

"X
Without recourse
Y"

Held, that oral evidence was competent to show that the words "Without recourse" were written by and intended to apply to the payer, X. Leahmer v. McCollough, 99 Kan. 451, 162 Pac. 297; Goolrick v. Wallace, 154 Ky. 596, 157 S. W. 920, 49 L. R. A. (N. S.) 789.

The payee wrote on the back of the instrument the words, "I hereby transfer and assign all my right, title and interest in and to the within note." *Held*, that this is a qualified indorsement and equivalent to an indorsement without recourse. Evans v. Freeman, 142 N. C. 61, 54 S. E. 847. The court seemed to treat

1 "The drawer of a bill, and any indorser, may insert therein an express stipulation (1) negativing or limiting his own liability to the holder; (2) waiving as regards himself some or all the holder's duties." B. E. A. s. 16.

the instrument as negotiable in form, but as set out in the statement of facts it was not so.

The words, "I transfer my right, title and interest in the same," written on the back of a negotiable instrument by the payee, is not a qualified indorsement, but creates the liability of an ordinary indorsement. Copeland v. Burke (Okla.), 158 Pac. 1162, L. R. A. 1917A, 1165. So, also, the words, "I Here By assine this note over to X," is an indorsement. Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863, S. C. sec. 31. But in Nelson v. Southworth, 93 Kan. 532, 144 Pac. 835, it was held, that the rights of a transferee were no greater than those of the payee who had delivered the note upon the following assignment: "For value received, I hereby assign and transfer the within note and coupons, together with all my interest in and all my rights under the mortgage deed securing the same, to * * *, without recourse." The court cited older Kansas cases to the same effect.

Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, S. C. secs. 1-2, 31, is *contra*, and holds that an indorsement, "I hereby sell, transfer and assign the within note," is a commercial indorsement and not a mere assignment, and that a transferee before maturity does not take the note subject to equities.

The fact that an indorsement is "without recourse" is not enough to put a purchaser upon notice of equities. Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068, S. C. secs. 34, 52-3; Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587, S. C. sec. 56; Morehead v. Harris (Ark.), 182 S. W. 521, not citing N. I. L.; Colvert v. Harrington, 61 Ind. App. 608, 112 N. E. 249; Higby v. Bahrenfuss (Iowa), 163 N. W. 247, S. C. sec. 52.

Nor is it evidence against the indorsee's good faith. Leavitt v. Thurston 38 Utah 351, 113 Pac. 77, S. C. sec. 59; see Merchants Nat. Bank v. Bransom, 165 N. C. 344, 81 S. E. 410, where it was said that it may be evidence, with other facts, to show that the indorsee was not a holder in due course.

An indorsement "By agreement, with recourse after all security has been exhausted, waiving protest," obligates the indorser to pay only such balance as may be due after the security has been exhausted. No cause of action arises against such an indorser until the security is exhausted. The N. I. L. was not cited. Smith v. Show, 16 N. D. 306, 112 N. W. 1062.

Where the payee of a negotiable note indorses it, "I hereby guarantee the payment of the within note and waive demand and notice of protest," he is liable not as a mere guarantor but as an indorser with an enlarged liability. The N. I. L. was not cited on this point. First Nat. Bank v. Baldwin, 100 Neb. 25, 158 N. W. 371.

A negotiable promissory note is not made non-negotiable by indorsing it, "Without recourse, pay to the order of A or B." An indorsement by either A or B will pass the title. Page v. Ford, 65

Ore. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048, S. C. secs. 1, 8-5.

A writing on the back of a negotiable note signed by the payee, "I hereby assign my interest in this note to G," is not a legal indorsement enabling G to bring an action therein in his own name, but merely an assignment within Comp. Laws, section 10054, whereby only an assignee of non-negotiable choses in action can sue in his own name. Nor does section 38, N. I. L., aid the assignee, for, if the writing in question is a qualified indorsement, it constitutes the indorser a mere assignor, and the assignee is here also debarred by Comp. Laws, section 10054, from suing in his own name. Gale v. Mayhew, 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648.

A note was indorsed, "without recourse and without warranty of any character, pay to the order of X." *Held*, that this was a qualified indorsement under section 38, and that under section 51 X could maintain a suit on the note in his own name. Gale v. Mayhew, *supra*, distinguished, but the *dictum* in that case that Comp. Laws, section 10054, prevents an indorsee without recourse from suing in his own name must be considered as overruled. Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524, S. C. sec. 4-2.

Sec. 39. Conditional Indorsement.

Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.[1]

Sec. 40. Indorsement of Instrument Payable to Bearer.

Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.[2]

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[1] The words " or his transferee" and the provision in the last sentence are omitted in B. E. A. s. 33.

[2] Not in B. E. A.

The Illinois Act substitutes for "payable to bearer," in line 1, the words "originally payable to or indorsed specially to bearer."

AMES: This section is not in the English Act and it is repugnant to section 9-5. By section 9-1-5 an instrument is payable to bearer, when expressed to be so payable and when the only or last indorsement is an indorsement in blank. If an instrument, payable to order, is indorsed in blank and is specially indorsed by a subsequent holder, it is not under this section payable to bearer. Yet by section 40 this instrument may be negotiated by mere delivery, thus restoring the rule of Smith v. Clarke, Peake 225, which as Chalmers says (Bills of Exchange, 5th Ed. 24), section 9-5 was intended to abrogate.

BREWSTER: Section 40 implies that the negotiation by delivery is by the owner and under section 49 his title would pass with the right to have an indorsement.

AMES: Judge Brewster's explanation of section 40 seems an after-thought. To interpolate the words "by the special indorsee" after the word "negotiated," thus restricting the further negotiation by delivery to a delivery by him, is to take an unwarrantable liberty with the statute.

MCKEEHAN: Smith v. Clarke and all the cases fallowing it are cases of instruments *originally payable to order*. None of them refer to instruments originally payable to *bearer*. [The case of Johnson v. Mitchell, 50 Tex. 212, which follows Smith v. Clarke, and in which the instrument was payable to "A, or bearer," seems to have been overlooked.—Ed.] For this reason and also because of the historical and logical distinction between instruments originally payable to bearer and those made so by indorsement in blank, section 9-5 may abrogate the rule of Smith v. Clarke and restrain the negotiation by delivery of an instrument, payable to order and indorsed in blank, and subsequently indorsed specially, leaving section 40 to apply only to instruments expressly made payable to bearer. In this way, and in this way only, can the two sections be harmonized.

For the convenience of those to whom the original publication[1] may not be accessible, the following argument in favor of the repeal of section 40 is repeated: "Section 40 should be repealed. In

[1] Brannan, Some Necessary Amendments of Negotiable Instruments Law, 26 Harvard Law. Rev. 500.

the case of Smith v. Clarke[2] it was held that the *bona fide* holder of a bill indorsed in blank acquired the legal title by such indorsement in blank, and that he might strike out the names of all intermediate indorsers, whether such indorsements were special or not, and hold the acceptor on the bill merely by proving the handwriting of the payee. The theory of the case was that the indorsement of the payee in blank made the bill payable to bearer and no subsequent holder could restrain its negotiability.[3]

"The English Bills of Exchange Act did not adopt the rule of Smith v. Clarke but, on the contrary, abrogated it, for by section 8(3) it provided that, 'a bill is payable to bearer which is expressed to be so payable or on which the only or last indorsement is in blank.' It is obvious that where the last indorsement on a bill or note payable to order is a special indorsement, the instrument is not payable to bearer, under this subsection and that section 8(3) of the Bills of Exchange Act altered the law. Judge Chalmers, the draftsman of the act, says that this subsection 'was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank.' The Negotiable Instruments law in section 9-5[4] copies section 8(3) of the Bills of Exchange Act with slight unimportant changes in phraseology, thus denying the principle of Smith v. Clarke. Yet section 40 re-enacts Smith v. Clarke and was so understood by the draftsman, who cites Smith v. Clarke in support of the section.[5] The repugnancy of section 40 to section 9-5 was clearly pointed out by Professor Ames in his articles criticizing the Negotiable Instruments Law.[6] Judge Brewster made some unavailing attempts to uphold section 40.[7] Mr. McKeehan in his able review of the controversy between Professor Ames and Judge Brewster suggested,[8] that sections 9-5 and 40 might be reconciled by limiting the operation of section 40 to instruments originally payable to bearer or subsequently made so by indorsement to bearer, and in support of that theory he said that Smith v. Clarke and all the cases following it involved instruments payable to order and indorsed in blank by the payee.

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2 [1794], 1 Esp. 180, S. C. Peake 225.

3 Pollock, C. B., in Walker v. MacDonald [1848], 2 Exch. 527, 532.

4 The instrument is made payable to bearer "1. When it is expressed to be so payable, or * * * 5. When the only or last indorsement is an indorsement in blank."

5 Crawford, Negotiable Instruments Law, 3d ed. 55. (In his 4th edition Mr. Crawford defends section 40 and adopts Mr. McKeehan's suggestion, but the citation of both Smith v. Clark, *supra*, and Johnson v. Mitchell, *supra*, as authorities under section 40 in all previous editions of Mr. Crawford's book seems to indicate that the distinction between instruments originally drawn payable to bearer, and those drawn payable to order and indorsed in blank, was not in the draftsman's mind at the time the section was drawn. Ed.)

6 *Infra*, pp. 425 *et seq.*

7 *Infra*, pp. 440 *et seq.*, 459 *et seq.*

8 *Infra*, pp. 486 *et seq.*

"But it is submitted that the mercantile understanding that if an instrument payable to bearer is indorsed specially, the indorsement of the special indorser should be necessary for negotiation applies equally to instruments expressly payable to bearer and to instruments payable to order and indorsed in blank, and the opinion of bankers consulted by the writer and by his colleague, Professor Williston, was unanimous to this effect. And the convenience of the holder in being able to restrict negotiation by a special indorsement is as desirable in one case as in the other.

"In the second place, it is not quite true that in all cases following Smith v. Clarke the instrument was payable to order. In Johnson v. Mitchell[1] a note payable to "A or bearer" was specially indorsed by A to C. The plaintiff D sued on it without an indorsement by C and was allowed to recover without proof of any assignment by C and Smith v. Clarke and other similar cases were cited and relied upon by the court. It is to be observed that Johnson v. Mitchell is also cited by Mr. Crawford under section 40. It would seem clear that the inconsistency between section 9-5 and section 40 was overlooked when the act was drawn and adopted, and that section 40 should be repealed."

As to the argument that to permit the holder of bearer paper to indorse specially would allow him to vary the contract of the maker or acceptor, it is to be remembered that we are speaking of statutory provisions, and there is no objection to the legislature enacting a law, attaching to bearer paper, thereafter issued, the quality of being subject to be specially indorsed. The English statutes as to crossing checks do this.[2] The holder of a check whether payable to order or to the bearer may cross it, so that it will be payable to any bank or banker, or to a particular bank, and he may even cross it so that it becomes not negotiable in the sense, that, while it is still transferable, yet the transferee, although a holder in due course, takes the risk of the transferor having a good title. Again, there is no good reason why the legislature should not also provide that a special indorsement of bearer paper shall be notice to the maker, drawer or acceptor, that the special indorsee is the owner of it and oblige the maker, drawer or acceptor to inquire as to the rights of the special indorsee, if the instrument is presented for payment by some other than the indorsee, and without his indorsement. Bearer checks are often indorsed "Pay to any bank or banker." Surely a drawee would not be protected if he should pay to any one, except a bank or banker, who happened to present the check, thus disregarding the special indorsement. In like manner, if the drawee has refused to pay, the drawer would surely not be entitled to pay to any person except to a bank or banker, and if he did, he should be liable to pay again, if the person presenting it had not the right to the instrument.

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[1] [1878], 50 Tex. 212.

[2] Chalmers, Bills of Exchange, secs. 76-82; see *infra*, appendix 1, pp. 557-561.

Sec. 41. Indorsement Where Payable to Two or More Persons.

Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

The Wisconsin Act inserts "joint" before "indorsee" in line two.

First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4, 124.

An assignment by one joint payee of his interest to another payee carries with it authority to indorse the instrument for him. The N. I. L. was not cited. Kaufman v. State Sav. Bank, 151 Mich. 65, 114 N. W. 863, 18 L. R. A. (N. S.) 630, 123 Am. St. Rep. 259.

A note payable to "A or B" is not within this section but is governed by section 8-5 and may be negotiated by the indorsement of either payee. Union Bank v. Spies, 151 Iowa, 178, 130 N. W. 928, S. C. sec. 3.

Sec. 42. Effect of Instrument Drawn or Indorsed to a Person as Cashier.

Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.[1]

In South Dakota the words "the indorsement of" are omitted before the words "the bank" in the last part of the section.

S was cashier of the C bank. A certificate of deposit issued by the C bank to the order of "S Cashier" was indorsed "S Cashier," and came to the plaintiff, a holder in due course. *Held*, that the indorsement was that of the bank, and that it was not competent

[1] Not in B. E. A.

for the bank to show that S acted in his own interest and in violation of his duty to the bank. Johnson v. Buffalo Bank, 134 Iowa, 731, 112 N. W. 165.

Where a note was indorsed to A, parol evidence is not admissible to show that a bank was intended as indorsee, even though A is, in fact, cashier of such bank. If A delivers the note to the bank without indorsement, the bank may sue upon it, but subject to equities. First Nat. Bank v. McCullough, 50 Ore. 508, 93 Pac. 366, 17 L. R. A. (N.S.) 1105, 126 Am. St. Rep. 758.

A note was payable to the order of X. Possession by a bank of the note unindorsed does not prove title in the bank, although X was the cashier of the bank. Swanby v. Northern State Bank, 150 Wis. 572, 137 N. W. 763.

Where the president of a bank by authority of the directors discharges the duties ordinarily performed by a cashier, a draft drawn payable to the president by name with the addition of "Pt" is payable to the bank. Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13.

An instrument payable to the "Treasurer of the Town of F," in legal effect stands on the same footing as if payable to the town, which is the real payee. Quincy Mut. Fire Ins. Co. v. International Trust Co., 217 Mass. 370, 104 N. E. 845, L. R. A. (N. S.) 1915B, 725, S. C. sec. 56.

But "corporation," in section 42 does not include cities and towns and confers no authority upon a town treasurer to impose upon his town the liability of an indorser. Franklin Savings Bk. v. Framingham, 212 Mass. 92, 98 N. E. 925; Capital Savings, etc., Bk. v. Framingham, 246 Fed. Rep. 553, 158 C. C. A. 523.

In Eades v. Muhlenberg Co. Sav. Bank, 157 Ky. 116, 163 S. W. 494, it was held that although the N. I. L. did not apply because the note was non-negotiable, yet, being payable to X cashier, it was payable to the bank, which could sue on it in his own name. There is an evident omission of the word "not" in the opinion where it is said that "the note being payable to order or to bearer is not negotiable."

Sec. 43. Indorsement Where Name Is Misspelled, Etc.

Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Sec. 44. Indorsement in Representative Capacity.

Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

A note payable to "the order of ourselves" was signed "First United Presbyterian Church, Pres. J. E., Treas. E. A. S.," and was indorsed "First United Presbyterian Church, J. E. Pres., E. A. S. Treasurer. Finance Committee, J. E., E. A. S., J. McK." It was not contended that the defendants J. E. and E. A. S. were liable as makers, but that they and also J. McK. were liable as indorsers. *Held*, that this form of indorsement negatived personal liability of the defendants. Chelsea Exchange Bank v. First U. P. Church, 89 Misc. Rep. 616, 152 N. Y. Supp. 201.

Sec. 45. Time of Indorsement—Presumption.

Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

Catholic University v. Waggaman, 32 App. D. C. 307; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Colborn v. Arbecam, 54 Misc. Rep. 623, 104 N. Y. Supp. 986; Cedar Rapids Nat. Bk. v. Bashara, 39 Okla. 482, 35 Pac. 1051.

Sec. 46. Place of Indorsement—Presumption.

Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.[1]

In the absence of evidence to the contrary, a note is held to be made at the place where it is dated. The N. I. L. was not cited on this point. Finch v. Calkins, 183 Mich. 298, 149 N. W. 1037, S. C. sec. 73.

A married woman, accommodation indorser of a note dated and payable in New York, is estopped as against a holder in due course to show that the indorsement was made in New Jersey, where it would be void. Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717.

Sec. 47. Continuation of Negotiable Character.

An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

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[1] Not in B. E. A.

An overdue promissory note is still negotiable within a statute exempting from attachment debts secured by bills of exchange or negotiable promissory notes, and hence the amount due thereon is exempt from foreign attachment. Section 47, N. I. L., is consistent with this view. Oakdale Mfg. Co. v. Clarke, 29 R. I. 192, 69 Atl. 681.

Indorsee against maker of a promissory note. The declaration alleged indorsement and delivery to the plaintiff by the payee for value before maturity. A plea denying that the note was indorsed and delivered before maturity was held defective because not showing any equity against the payee. Barnes v. Carr, 65 Fla. 87, 61 So. 184.

This section does not relieve an overdue instrument from any defense in a suit by the transferee of such instrument which the maker and prior indorsers might have against it. Ohio Valley, etc., Co. v. Great Southern Fire Ins. Co. (Ky.), 197 S. W. 399.

Sec. 48. Striking Out Indorsement.

The holder may at any time strike out any indorsement which is not necessary to his title.(*a*) The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.[1]

In Kentucky the word "owner" is substituted for "holder in the first line," probably by an oversight.

Mackintosh v. Gibbs, 79 N. J. L. 40, 74 Atl. 708, S. C. sec. 66.

(*a*) An indorsee indorsed the note to a bank for collection, and upon its dishonor received it back. *Held*, such indorsee in possession of the note was a "holder" under section 191, and that he could sue upon it without striking out his indorsement. Mere possession was sufficient evidence of ownership to support the suit (section 51). New Haven Mfg. Co. v. New Haven Pulp Co., 76 Conn. 126, 55 Atl. 604.

One in possession of negotiable paper, indorsed in blank by the payee, is *prima facie* the owner thereof, and the mere erasure of subsequent indorsements does not destroy this presumption. King v. Bellamy, 82 Kan. 301, 108 Pac. 117. The N. I. L. was not cited in this case.

[1] Not in B. E. A.

Plaintiff sued the maker and the payee on a note indorsed by the payee in blank, under which indorsement appeared the words "to acc't of B. F. E." *Held,* that even if these words constituted a subsequent restrictive indorsement, it was not necessary to plaintiff's title, and he could strike it out at the trial and recover as bearer. Jerman v. Edwards, 29 App. D. C. 535.

In an action against the payee as indorser of a promissory note, there is no fatal variance between an averment alleging an indorsement by defendant to the plaintiff, and proof of a note bearing a first indorsement in blank by the payee, a second indorsement, and a negotiation to the plaintiff by delivery by the maker, since a note indorsed in blank is negotiable by delivery, and the holder of a note indorsed in blank by the payee may strike out all subsequent indorsements and sue as indorsee under the blank indorsement. Howell v. Commercial Nat. Bank, 40 App. D. C. 370.

Action to recover judgment on a note and to foreclose mortgage securing it. The note was indorsed in blank by the payee, the mortgage had been assigned to X by writing indorsed on the back and executed by the payee. Lines in red ink had been drawn through the assignment and afterwards the payee indorsed the mortgage in blank. Plaintiff offered the note and mortgage in evidence. The mortgage was excluded by the trial court and the action dismissed, because the plaintiff could not explain the erasure of the assignment on the back thereof and show that he was the owner. *Held,* error. King v. Bellamy, 82 Kan. 301, 108 Pac. 117.

Sec. 49. Transfer Without Indorsement—Effect of.

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor.(*a*) But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.[1]

In Alabama the words "said holder" are substituted for "transferor" in the first paragraph, and the words "for the purpose of

[1] The English Act omits the provision in the last sentence. B. E. A. s. 31 (4).

transferring title only'' are added at the end of said paragraph. Laws 1909, p. 134.

The Illinois and Missouri Acts, after the word ''right'' in the first sentence read as follows: ''to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose,'' etc.

The Colorado Act inserts after ''transferor,'' at the end of the first sentence, ''if omitted by mistake, accident or fraud.''

The Wisconsin Act adds at the end of the section: ''When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of transfer.''

(*a*) AMES: If the transferee gets only the title of the transferor, the transferee, even for value, of an accommodated payee, could not hold the maker, which would be unjust and contrary to the American cases. This defect could be cured by inserting words giving this right.

BREWSTER: Makes no answer to this criticism of Professor Ames.

MCKEEHAN: When the accommodating maker gives a note to the order of the payee, he promises to pay only to one holding under an indorsement and should not be held otherwise.

Bank of Bromfield v. McKinley, 53 Colo. 279, 125 Pac. 493; Lane v. Lane, 57 Colo. 419, 140 Pac. 804; Carter v. Butler, 264 Mo. 306, 174 S. W. 399, S. C. secs. 28, 30; Cantrell v. Davidson, 180 Mo. App. 410, 168 S. W. 271, S. C. sec. 120; First Nat. Bank v. Stam, 186 Mo. App. 439, 171 S. W. 567, S. C. sec. 2-5; Wright v. Wayland (Mo. App.), 188 S. W. 928; Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17, 115 N. Y. Supp. 402; Martz v. State National Bank, 147 App. Div. 250, 131 N. Y. Supp. 1045; Keel v. Construction Co., 143 N. C. 429, 55 S. E. 826; Piper v. Hagen, 33 S. D. 491, 146 N. W. 692; O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078; Lawless v. State, 114 Wis. 189, 89 N. W. 891, S. C. sec. 125.

It has been held in Scotland that under the Bills of Exchange Act, section 31(4), which is the same as section 49, N. I. L., the transferee for value, but without indorsement, of a bill accepted for the accommodation of the drawer-payee gets the title of the transferor and may hold the acceptor without first getting an indorsement. Hood v. Stewart, 17 Session Cases (4th Series) 749.

As observed by Professor Ames (*infra*, p. 543, n. 4), if the American courts should follow this Scotch case his objection to section 49 would disappear. Section 49 changes the law to the extent that a transfer for value, even without indorsement, of an instrument, payable to order, passes the legal title, although subject to equities. But accommodation, as against a transferee for value, is not, properly speaking, an equity, but only a defense against the accommodated party and transferees without value. The Scotch precedent ought therefore to be followed.

This section vests the title in the transferee without indorsement, and is not affected by secs. 30, 31. Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, S. C. sec. 18; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. sec. 187, affirmed without opinion, 183 N. Y. 511; Goodsell v. The McElroy Bros. Co., 86 Conn. 402, 85 Atl. 509.

In Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220, in Myers v. Petty, 153 N. C. 462, 464, 69 S. E. 417, 418, and in Bank v. McEachern, 163 N. C. 333, 79 S. E. 680 (citing not section 49 but section 30, and a case on an instrument made before the act was adopted), the courts say that the transferee without indorsement does not acquire the legal but only an equitable title. This is, of course, wrong, and unnecessary to the decisions that such transferee takes subject to equities. If the "transfer vests in the transferee such title as the transferor had" and if the transferror had the legal title, this must pass by the transfer, although subject to equities. The Court of Appeals of Alabama fell into the same error in German-American Nat. Bank v. Lewis, 9 Ala. App. 352, 63 So. 741, S. C. sec. 59.

But the transferee without indorsement of a note payable to order can not be a holder in due course, notwithstanding section 59, for under section 191 he is neither "holder," because not a payee or indorsee, nor "bearer," because the instrument is not payable to bearer. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, S. C. sec. 31; Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220; Myers v. Petty, 153 N. C. 462, 69 S. E. 417; Bank v. McEachern, 163 N. C. 333, 79 S. E. 680; Foster's Admr. v. Metcalf, 144 Ky. 385, 138 S. W. 314; Manufacturers, etc., Co. v. Blitz, 131 App. Div. 17, 115 N. Y. Supp. 402; Landis v. White, 127 Tenn. 504, 152 S. W. 1031. *Cf.*, Smith v. Nelson Land & Cattle Co., 212 Fed. Rep. 56, 128 C. C. A. 512, *infra*, p. 206. S. C. secs. 4-2, 25, 184, 191.

In Roy v. Duff, 170 Iowa, 319, 152 N. W. 606, it was held that under sections 16, 30, 49 and 52 the possession of a note, payable to order, but not indorsed, is *prima facie* evidence of the possessor's right to maintain an action against the maker, but that mere possession without indorsement or a showing of delivery or payment of consideration was not *prima facie* evidence of ownership as against the payee, and was an insufficient showing of the passing of title to the possessor. Only the latter point was involved, since the action was by the administrator of the legal owner of unin-

dorsed notes to recover them from one who was in possession, but could not show delivery or gift by the intestate or payment of consideration for the notes. But the court in deciding for the plaintiff made the distinction above mentioned.

It is submitted that this distinction is not valid and that mere possession of an unindorsed note payable to order is not *prima facie* evidence of ownership against the maker. It is as much to the interest of the maker as of the payee, that the possessor should be obliged to give evidence to show that the instrument was transferred to him by the legal owner, since otherwise the maker might be obliged to pay a second time. It is true that cases may be found, before the Negotiable Instruments Law, which make possession *prima facie* evidence of ownership as against the maker, but it is submitted that they are erroneous and that the weight of authority is to the contrary. See Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Cavitt v. Thorp, 30 Mo. App. 131; Richardson v. Drug Co., 92 Mo. App. 515; Dorn v. Parsons, 56 Mo. 601; Hair v. Edwards, 104 Mo. App. 213, 77 S. W. 1089; Wade v. Boone, 184 Mo. App. 88, 168 S. W. 360; Van Eman v. Stanchfield, 10 Minn. 255; Hathaway v. Co. of Delaware, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909, *semble*, S. C. sec. 52, and see also, cases cited in Capitol Hill State Bank v. Rawlins Nat. Bank, 24 Wyo. 423, 160 Pac. 1171, and in note in 50 L. R. A. 581.

But there is little room for doubt that, under the provisions of the Negotiable Instruments Law, the mere possession by a third person of an unindorsed note payable to order is not *prima facie* evidence of ownership, either as against the payee or the maker and so is the weight of authority.

As already pointed out, Roy v. Duff, *supra*, does not involve the point, and the statements of the court in Callahan v. Louisville Dry Goods Co., 140 Ky. 712, 715, 137 S. W. 995, must be regarded as *dicta*, since in that case, which was decided on demurrer to the declaration, which was sustained, the declaration alleged that the plaintiff succeeded the payee in business and acquired its assets, and that the plaintiff was the owner of and in possession of the note at the time suit was brought. But the question was directly raised and decided in Escamilla v. Pingree, 44 Utah, 421, 141 Pac. 103, L. R. A. 1915B, 475, although no reference was made to the Negotiable Instruments Law then in force in the state, and in Capitol Hill State Bank v. Rawlins Nat. Bank, 24 Wyo. 423, 160 Pac. 1171, S. C. sec. 30, in which case the court discussed the question at length as affected by sections 59, 191, 30 and 49, and held that in an action by the possessor of an unindorsed certificate of deposit, payable to order, against the maker, the mere fact of possession was not evidence of title. Such a person is not the "bearer" of the instrument, because by section 191 "bearer" means the person in possession of a bill or note which is payable to bearer. Nor is he a holder, because by the same section "holder means the payee or indorsee of a bill or note who is in possession of it or the bearer thereof." But section 49 creates

an anomalous situation in providing that where the holder of an instrument, payable to his order, transfers it for value, without indorsing it, the transfer vests in the transferee such title as the transferer had therein, but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when an indorsement is actually made. The section vests in the transferee the legal title of the transferer, but subject to equities until an indorsement is made. Kiefer v. Tolbert, 128 Minn. 519, 151 N. W. 529, S. C. sec. 124. (The N. I. L. was not cited.) Yet the transferee is not a holder because not within the definition of holder in section 191. It is evident that no presumption of a *prima facie* title can arise in favor of a plaintiff, who, although he is in possession, is not a payee, indorsee or bearer, and that in order to bring himself within the description of transferee under section 49 he must show that a holder transferred it to him for value.

Where a note secured by mortgage is given to take effect immediately for money to be subsequently advanced, the maker is estopped to assert a failure to advance the money as against a purchaser from the payee in good faith for value and without negligence, although the note was not indorsed by the payee; the rules of sections 49 and 58, N. I. L., giving way to the supreme rule of estoppel *in pais*. Marling v. FitzGerald, 138 Wis. 93, 120 N. W. 388, S. C. secs. 25, 58.

It is submitted that the decision is erroneous for two reasons: First, a transfer of a negotiable note payable to order without indorsement, has no more effect in cutting off equities than the assignment of a chose in action; and in general the assignee of a chose in action is subject to equities against the assignor arising before notice to the debtor of the assignment. Barker v. Barth, 192 Ill. 460, 61 N. E. 388. So, if a negotiable note is assigned without indorsement, payment to the payee by the maker, who has no notice of assignment is effectual against the assignee. Campbell v. Day, 16 Vt. 558; Vann v. Marbury, 100 Ala. 438, 14 So. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70; Dunn v. Meserve, 58 N. H. 429; Jones v. Witter, 13 Mass. 304. Failure of consideration before notice of the assignment should have the same effect. Second, by section 28, N. I. L., which was not cited by the court, failure of consideration is a matter of defense against any person not a holder in due course, and the assignee without indorsement can not be a "holder" because he is neither payee, indorsee, or bearer. See section 191.

Where plaintiff alleged that the payee indorsed and delivered the note to plaintiff and there is a general denial, plaintiff must prove indorsement. It is a material departure which can not be allowed merely to prove that the payee had delivered possession to plaintiff for value. Nance v. Hayward, 183 Mo. App. 217, 170 S. W. 429.

It is submitted that, no equities being pleaded by the defendant-maker, this ruling was one of those technicalities which lead to justifiable criticism of some of the courts.

The petition alleged that the payee before maturity indorsed the note to plaintiff for value in the usual course of business. The answer admitted execution and delivery of the note but denied the other allegations of the petition and pleaded that the note was obtained by fraud of the payee. *Held*, that the general denial put in issue the allegation that the note was indorsed before maturity and that testimony of witnesses, who saw the note after its maturity, that there were no indorsements on it was admissible. Peoples Trust, etc., Bank v. Rook, 96 Neb. 415, 148 N. W. 95. It was also held that evidence of the fraud was admissible, although the answer did not plead that the plaintiff had notice or took the note in bad faith or after maturity. Here, as in some other cases, the question of proper pleading was confused with that of the burden of proof.

ENGLAND—

Defendant, to accommodate C, drew a bill to his own order on C, who accepted the bill and transferred it to plaintiff for a loan. Defendant neglected to indorse the bill, which was not noticed by plaintiff when he made the advance. *Held*, that defendant was the "holder" of the bill within section 2 (N. I. L., section 191), that he transferred it by means of C to the plaintiff, and that plaintiff was entitled to have the indorsement of defendant and to recover against him on the bill. Walters v. Neary, 21 T. L. R. 146; *cf.*, Day v. Longhurst, Weekly notes [1893] 3, S. C. sec. 191.

Sec. 50. When Prior Party May Negotiate Instrument.

Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, S. C. sec. 121; Nolan Bros. Lumber Co. v. Dudley Lumber Co., 128 Tenn. 11, 156 S. W. 465.

ARTICLE IV.
RIGHTS OF THE HOLDER.

Sec. 51. Right of Holder to Sue—Payment.

The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.[1]

New Haven Mfg. Co. v. New Haven Pulp Co., 76 Conn. 126, 55 Atl. 604, S. C. sec. 48; Boline v. Wilson, 75 Kan. 829, 89 Pac. 678; Stanley v. Penny, 75 Kan. 179, 88 Pac. 875; Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187; Cleary v. DeBeck Co., 4 Misc. Rep. 537, 104 N. Y. Supp. 831, S. C. sec. 9-4.

The holder of the legal title to a note may sue thereon in his own name, although others may be beneficially interested therein. The N. I. L. was not cited. Chaffee v. Shartel, 46 Okla. 199, 148 Pac. 686. And even though he has no interest at all. Fay v. Hunt, 190 Mass. 378, 77 N. E. 502, citing old cases, but not the N. I. L. Harris v. Johnson, 75 Wash. 291, 134 Pac. 1048, not citing the N. I. L.

The payee or indorsee of a note in possession thereof, although not the beneficial owner, may strike out his own and subsequent indorsements and may sue in his own name by consent of the owner. R. M. Owen & Co. v. Storms & Co., 78 N. J. L. 154, 72 Atl. 441.

The indorsee of a note as collateral security may maintain an action thereon. Farmers' Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556; Melton v. Pensacola Bank, 190 Fed. Rep. 126, 111 C. C. A. 166, S. C. sec. 125.

Although the Code requires an action to be brought in the name of the real party in interest, yet under section 51, N. I. L., a holder, even though he be a holder only for collection, may sue in his own name. Craig v. Palo Alto Stock Farm, 16 Idaho, 701, 102 Pac. 393; Utah Implement Co. v. Kenyon, 30 Idaho, 407, 164 Pac. 1176; Harrison v. Pearcy, 174 Ky. 485, 192 S. W. 503, S. C. sec. 124; Curtis v. Douglas, 130 N. Y. Supp. 1054, not citing the N. I. L.

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1 "Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill." B. E. A. s. 38 (3).

In Third Nat. Bank v. Exum, 163 N. C. 199, 79 S. E. 498, the court in saying that an indorsee for collection can not maintain an action, citing an old case, evidently overlooked sections 51, 36 and 37 of the N. I. L.

Payment by the bank of a certified check indorsed in blank by the drawer-payee discharges the check, and repayment to the bank by the one who received payment, when threatened with suit, will not entitle him to sue the bank on its certification, although he was a holder in due course and the check was returned to him. The money repaid passes to the credit of the depositor and the bank is liable to him for it. Poess v. Twelfth Ward Bank, 43 Misc. Rep. 45, 86 N. Y. Supp. 857, S. C. secs. 16, 187.

Where a promissory note was attached and sold under an execution against the holder, the purchaser may sue thereon in his own name, whether the indorsement by the sheriff was regular or irregular, and whether it was indorsed or not. Fishburn v. Londershausen, 50 Ore. 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1234.

ENGLAND—

The plaintiff was the indorsee in good faith for value before maturity of an unaccepted bill drawn on the defendants, payable to the order of X, which the defendants subsequently accepted. A dispute arose between the defendants and the drawer and the defendants refused to meet the bill. The drawer then requested the plaintiff to sue the defendant in the plaintiff's own name and guaranteed the expenses and agreed to pay the bill if the plaintiffs failed to recover the amount from the defendants. In an action brought by the plaintiffs against the defendants on the bill: *Held*, (1) that the bill was a complete bill when purchased by the plaintiffs, though it had not then been accepted, and that therefore the plaintiffs were holders in due course, and (2) that the plaintiffs were not suing as trustees for the drawer and that therefore the defendants were not entitled to set up the same defenses as they would have been entitled to set up against the drawer, and consequently the plaintiffs were entitled to recover. National Park Bank of New York v. Berggren & Co., 110 L. T. 907, 30 T. L. R. 387.

Sec. 52. What Constitutes a Holder in Due Course.

A holder in due course is a holder who has taken the instrument under the following conditions:—(*a*)

1. That is complete and regular upon its face;(*b*)
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;(*c*)
3. That he took it in good faith and for value;(*d*)

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.[1](*e*)

The Wisconsin Act adds: "5. That he took it in the usual course of business."

(*a*) Bruce v. Citizens Nat. Bk., 185 Ala. 221, 64 So. 82; Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805; Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, S. C. sec. 14; Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636, S. C. secs. 28, 125; Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959, S. C. secs. 2-5, 16, 56, 191; White v. Dodge, 187 Mass. 449, 73 N. E. 549; Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923; Borough of Montvale v. Peoples' Bank, 74 N. J. Law, 464; 67 Atl. 67, S. C. sec. 56; Ketcham v. Govin, 35 Misc. Rep. 375, 71 N. Y. Supp. 991; Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N. Y. Supp. 922, S. C. sec. 16; Karsch v. Pottier Co., 82 App. Div. 230, 81 N. Y. Supp. 782; Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. Supp. 1043; Goetting v. Day, 87 N. Y. Supp. 510, S. C. sec. 56; Milius v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669, S. C. sec. 25; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Arons v. Ziegfeld, 52 Misc. Rep. 571, 102 N. Y. Supp. 898; National Bank v. Foley, 54 Misc. Rep. 126, 103 N. Y. Supp. 553, S. C. secs. 25, 52-3, 59; Siegmeister v. Lispenard Co., 107 N. Y. Supp. 158; Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59, 185; Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817, S. C. sec. 66; McNamara v. Jose, 28 Wash. 461, 68 Pac. 903, S. C. sec. 56; Gray v. Boyle, 55 Wash. 578, 104 Pac. 828; Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479; *In re* Troy & Cohoes Shirt Co., 136 Fed. Rep. 420, S. C. sec. 56.

Sections 52, 55, 56 and 59 vary the ordinary rule of procedure requiring him who alleges a fact to prove it, but they are not unconstitutional as an invasion of the judicial power by the Legislature. Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132.

An allegation in an answer that plaintiff is not a holder in due course is a conclusion of law and insufficient to show which of the conditions named in section 52 has not been complied with. Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49, S. C. secs. 26, 30.

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[1] The English Act omits the words "infirmity in the instrument." B. E. A. s. 29 (1) (b).

The evidence tended to show that plaintiff took for value a check drawn by defendant, but knowing that it had been delivered to the payee upon a condition which had not been fulfilled and that payment had been stopped. *Held,* error to direct a verdict for the plaintiff, as the question whether plaintiff was a holder in due course within sections 52, 55, 56, N. I. L., is for the jury. Groh's Sons v. Schneider, 34 Misc. Rep. 195, 68 N. Y. Supp. 862.

The pledgee for value in good faith of a complete unmatured note, without notice of equities, is a holder in due course. Anderson v. Union Bank, 117 Va. 1, 83 S. E. 1080.

A woman delivered to her husband a check made payable to a certain creditor, with instructions to pay her debt with it. The husband handed the check to the creditor as a payment upon a debt of his own to the same creditor who accepted it as such in good faith. *Held,* the creditor was a holder in due course of the check. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, S. C. sec. 14.

The payee of a negotiable instrument may be a holder in due course. *Ib.,* Thorpe v. White, 188 Mass. 333, 74 N. E. 592, *accord,* S. C. secs. 64-1, 124; Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B, 144, S. C. sec. 14; Nat. Investment Co. v. Corey, 222 Mass. 453, 111 N. E. 357; Colonial Fur Co. v. First Nat. Bank (Mass.), 116 N. E. 731; Brown v. Brown, 91 Misc. Rep. 220, 154 N. Y. Supp. 1098, *sub nomine,* Brown v. Rowan, S. C. sec. 14; *Ex parte* Goldberg & Lewis, 191 Ala. 356, 67 So. 839, L. R. A. 1915F, 1157. *Cf.,* Hathaway v. County of Delaware, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909, which is *contra* in principle, although the N. I. L. was not cited.

A drew a check on defendant bank payable to plaintiff and gave it to a messenger to have it certified and give to plaintiff in payment for revenue stamps. Defendant certified the check, B stole it and posing as A's messenger delivered it to plaintiff, who gave full value for it. Plaintiff sued defendant. *Held,* that even assuming that plaintiff acted in good faith, yet plaintiff was not a holder in due course and that it can not recover. Empire Trust Co. v. Manhattan Co., 97 Misc. Rep. 694, 162 N. Y. Supp. 629. Determination affirmed, no opinion, 180 App. Div. 891; see criticism in 30 Harvard Law Rev. 515.

It is submitted that this case is wrong. Plaintiff was a holder of the check because it was the payee who was in possession of it (section 191). Plaintiff was a holder in due course, if the check was negotiated to it, because plaintiff clearly came within the definition of holder in due course in all other respects (section 52). The check was negotiated to plaintiff because it was transferred to plaintiff in such manner as to constitute plaintiff the holder, for plaintiff was the payee and by the transfer to it the plaintiff came into possession of the check (section 30). "The section carefully abstains from prescribing that the transferor must be a holder," per Fletcher Moulton, L. J. [1907], 1 K. B. 794, 808, so that even a

thief can transfer to anyone a bearer instrument and to the payee an instrument payable to his order.

These conclusions are not vitiated by section 16, for plaintiff, being by all the definitions a holder in due course, a valid and intentional delivery by all parties prior to him is conclusively presumed. This result is not prevented by the first clause of section 16 which requires a delivery as between immediate parties, and as regards a remote party other than a holder in due course. Was plaintiff an immediate party? No, because "immediate parties" excludes a holder in due course. "Immediate parties" means parties who are immediate to the conditions or limitations placed on the delivery in the sense of knowing or being chargeable with notice of them. Liberty Trust Co. v. Tilton, *supra*, pp. 55-56, and upon the assumption that he acted in good faith, plaintiff did not come within this category. "Immediate" means privity not proximity. A payee is in proximity to the maker, but he may or may not be in privity with or immediate to the maker. Whether we say that, as to a holder in due course, delivery is immaterial or that, as the statute puts it, delivery is conclusively presumed, the result is the same. If a complete negotiable instrument gets out of the hands of the maker, it matters not whether this occurs by an absolute or conditional delivery or by no delivery at all, as in the case of theft from the maker. If it comes to the hands of one who can show himself to be a holder in due course, the maker is bound, and that a payee is capable of being a holder in due course has been almost universally held at common law, and according to the great weight of authority the Negotiable Instruments Law has made no change in this respect. See cases cited under section 14, *supra*, pp. 49 *et seq.*

To the contrary under the Negotiable Instruments Law are only Vander Ploeg v. Van Zuuk, 135 Iowa, 350, *supra*, p. 49, which followed Herdman v. Wheeler [1902], 1 K. B. 361, *supra*, pp. 49, 53, which has since been greatly discredited and practically overruled in Lloyd's Bank v. Cooke [1907], 1 K. B. 794, *supra*, p. 51, and Long v. Shafer, 185 Mo. App. 641, 648, where the question is disposed of without any reasoning or citation of authorities in a mere hasty, matter-of-course manner. St. Charles Sav. Bank v. Edwards, 243 Mo. 553, 147 S. W. 978, does not hold that a payee may not be a holder in due course, but that the delivery of a check to the payee is not a negotiation. But this is contrary to authority and the court apparently made no examination of the sections of the statute on the subject, cited no cases and the statement was, moreover, unnecessary to the result. A cashier of a bank drew checks in the name of his bank on another bank to the order of plaintiffs, who were brokers, and gave them to plaintiffs on account of his individual operations in stocks. This may be and was a negotiation and yet the payee's knowledge of the fact that the cashier was using the funds of the bank for his own purposes made them guilty of bad faith. The payees in this case were both proximate and "immediate" parties because of their knowledge of the facts.

It is to be regretted that the Appellate Division gave no opinion in the case under discussion (Empire Trust Co. v. Manhattan Co.). When Appellate Courts affirm judgments without an opinion, and without even adopting the opinion of the lower court, one is led to suspect that the court must have had difficulty in finding reasons for its judgment of affirmance.

It is possible, however, that the Appellate Division affirmed the judgment because the jury found that the plaintiff had acted in bad faith and the trial justice in the city court stated, that he felt that this verdict on the question of fact was justified. The affirmance, therefore, can not be regarded as adopting the conclusion of the Supreme Court Appellate Term on the question of law. It would indeed be regrettable if a court of the greatest commercial state had taken a position so contrary to the great weight of authority, both at common law and under the Negotiable Instruments Law. In any event the case is not an authority for the proposition that a payee can not be a holder in due course under the Negotiable Instruments Law. On the contrary, the Supreme Court conceded that he may be, as was held by the Supreme Court of Massachusetts in the case Boston Steel & Iron Co. v. Steurer, *supra*, p. 162, and Liberty Trust Co. v. Tilton, *supra*, p. 54, but reached its result by making a vain distinction between the case before it and the Massachusetts cases.

For further discussion of the question whether a payee can be a holder in due course under the Negotiable Instruments Law, see section 14(*c*) *supra*, pp. 49 et seq.

A note payable to the maker's order was indorsed in blank to a bank. The note was afterwards altered by inserting "payable with interest." The bank made a deed of trust of all its property including the note to secure its creditors. *Held*, that in Virginia a pre-existing debt is a valuable consideration for a deed of trust to secure it, and that the trustee was a holder in due course and could recover on the note according to its original tenor, under section 124. Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14, S. C. secs. 52-1.

The payee of a note agreed with the accommodation maker that it should not be negotiated to one R, of which fact R was aware. The payee offered to sell the note to R, who lent the money to S, who bought the note. Before maturity S sold the note to plaintiff, who was ignorant that it was an accommodation note and of the agreement, and who paid for it by his own note to S, who still held it. *Held*, plaintiff could recover of the maker the full amount of the latter's note. Mehlinger v. Harriman, 185 Mass. 245, 70 N. E. 51.

A statute declared that any contract made by or on behalf of a foreign corporation failing to comply with the laws of the state, as to registration, etc., should be "wholly void on behalf of such corporation or its assigns." *Held*, the word "assigns" as used in the statute did not include a holder in due course of a negotiable instrument made to the order of such corporation. Nat. Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63. See also, McMann v. Walker, *infra*, sec. 60.

The payee of an accommodation note indorsed it before maturity to A for goods to be furnished at once and in the future. A furnished goods both before and after the maturity of the note. A sold to plaintiff the note and the debt due from the payee. *Held,* that the accommodation maker could not set up the defense of want of consideration. *Semble,* that accommodation paper may be negotiated even after maturity so as to make the purchaser for value a holder in due course. Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, S. C. *supra,* sec. 29, with comment.

A bank purchased a note in the usual course of business at the usual rate of discount. *Held,* that a notice to the maker stating that the note was at the bank "for collection" was not an admission that the bank was not a holder in due course The N. I. L. was not cited. Bank of Baraboo v. Laird, 150 Wis. 243, 136 N. W. 603.

Plaintiff bank was the holder in due course of a note against which the maker claimed to have a defense of fraud. Upon the maturity of the note, the indorser deposited bonds with the plaintiff "as security for the debt and costs and as collateral for the payment of the note" and requested plaintiff to sue the maker, which plaintiff did. *Held,* that plaintiff can not sue as an innocent holder and can not recover against the maker. The N. I. L. was not cited. First Nat. Bank v. Fox, 40 App. Cas. D. C. 430. *Sed quaere?* The plaintiff's title was the same as when first acquired, that is, the legal title and the beneficial ownership, since it had not been paid. The maker's remedy was to file a bill in equity against the bank and the fraudulent indorser and have the security applied to pay the note. If plaintiff were a naked trustee for the indorser this could be set up by the maker as an equitable defense, but plaintiff was not a trustee. but sued in its own right as owner. The court spoke of a law of New York "when a bank holds security they are not entitled to sue the indorser and collect as an innocent holder." No reference was given and the law has not been found. The effect of section 121 N. I. L. is to give the holder the right to sue the maker, although the holder has been secured or paid by the party secondarily liable. People's Nat. Bank v. Rice, 149 N. Y. App. Div. 18, 133 N. Y. Supp. 622. See also, Twelfth Ward Bank v. Brooks, 63 N. Y. App. Div. 220, 71 N. Y. Supp. 220; Capitol Nat. Bank v. Robinson, 41 Wash. 454, 83 Pac. 1021, S. C. sec. 88.

Where a corporation took over the assets of a private bank and agreed to assume the liabilities in consideration of the transfer of the assets of the bank, among which was defendant's note, the corporation took the note subject to a contemporaneous parol agreement by which the note never became an absolute obligation in *presenti.* Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841, S. C. sec. 16. *Sed quaere?* See dissenting opinions and comment under section 16, *supra.* Bank of Tallassee v. Jordan (Ala.), 75 So. 930. accord.

(*b*) *In re* Estate of Philpott, 169 Iowa, 555, 151 N. W. 825, S. C. secs. 14, 53; Miller v. People's Sav. Bank, 193 Mo. App. 499, 186 S. W. 547; Elias v. Whitney, 50 Misc. Rep. 326, 98 N. Y. Supp. 667, S. C. sec. 124.

One who takes a note payable "on or before four ——— after date," with the blank unfilled, is not a holder in due course. Such a note is not payable on demand. *In re* Philpott's Estate, 169 Iowa, 555, 151 N. W. 825, S. C. secs. 14, 53.

The fact that the words "payable with interest" are written on a blank space after the words "value received," in the same handwriting as the other written parts of the note, does not prevent the note being complete and regular on its face. Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14, S. C. sec. 52.

A partner in a firm which had dissolved, but without giving notice thereof, signed notes in blank payable to X and sent them to X or to a bank where they were filled up as to date, amount and maturity, by the cashier as occasion required, and the proceeds placed to the credit of X. *Held*, that the bank was not a holder in due course, and could not recover against the retired partner without proof that he had authorized or ratified the issue of the notes. Hunter v. Allen, 127 App. Div. 572, 111 N. Y. Supp. 820, *sub nomine*, Hunter v. Bacon, affirmed without opinion, 203 N. Y. 534.

ENGLAND—

A post-dated check is valid and negotiable, and is complete and regular on its face, notwithstanding it is stamped as a check, and not as a bill of exchange payable on time. Hitchcock v. Edwards, 60 L. T. Rep. 636.

The defendant accepted a bill otherwise complete, but the place for the drawer's signature was left blank and under it was written, "Drawn to the order of X." The bill was sent to X to be used for a certain purpose. X, instead of using the bill for such purpose, transferred it to plaintiff, who paid value *bona fide*. X indorsed the bill, but neglected to sign it as drawer until after it was overdue and dishonored. *Held*, that the bill was not complete and regular when plaintiff took it and that he could not recover. South Wales, etc., Co. v. Underwood (Q. B. Div. 1899), 15 T. L. Rep. 157.

(*c*) McGehee v. Cooke, 55 Misc. Rep. 40, 105 N. Y. Supp. 60; Lindsay v. Dutton, 217 Pa. 148, 66 Atl. 250.

Where a note, when transferred to the plaintiff, showed on its face that the date of maturity had been altered from May 15, 1907, to May 15, 1908, and the transfer was made November 2, 1907,

it was held that plaintiff was charged with notice by the instrument itself, that it was overdue and therefore he was not a holder in due course. Pensacola State Bank v. Melton, 210 Fed. Rep. 57, S. C. sec. 124.

A note providing that any delinquency in the payment of interest "shall cause the whole note to immediately become due and collectible," is made overdue by the failure to pay the interest when due, and a subsequent taker can not be a holder in due course. Hodge v. Wallace, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938.

Secus, where such provision is not in the note, but only in the mortgage securing it. Taylor v. American Nat. Bank, 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309. The fact that no payments of interest were indorsed on the note or mortgage did not make the note dishonored or prevent plaintiff from being a holder in due course. *Ib.* Spencer v. Alkali Paint, etc., Co., 53 Wash. 77, 101 Pac. 509, S. C. sec. 17-6.

And the mere fact that interest on a note was overdue does not, in the absence of a stipulation making the principal due upon failure to pay interest, affect an indorsee with notice of dishonor or put him on inquiry. Higby v. Bahrenfuss (Iowa), 163 N. W. 247, S. C. sec. 38; McPherrin v. Tittle, 36 Okla. 510, 129 Pac. 721, 44 L. R. A. (N. S.) 395. But it is a material circumstance bearing on the question whether the indorsee acquired the note in good faith and without notice of defects of title. *Ib.*

The fact that interest was seven months overdue when the holder took the note, and that the holder and his indorser were friendly, does not require a holding that the note was acquired in bad faith. The N. I. L. was not cited. Shultz v. Crewdson (Wash.), 163 Pac. 734.

But it is of some weight on the question of good faith and the length of time interest has remained unpaid, as it may influence the weight of such evidence. *Ib.* And it is enough to entitle the defendant to go to the jury on the question whether plaintiff is a holder in due course. Citizens' Savings Bank v. Couse, 68 Misc. Rep. 153, 124 N. Y. Supp. 79.

In an action by the indorsee of a promissory note against the maker, the facts that an installment of interest was overdue at the time the note was bought, and payment of such installment was not indorsed on the note, that the note was purchased at considerable discount, and that although the indorser was solvent and lived in the same town as the plaintiff, the latter chose to bring suit against the maker in a distant state, are all circumstances to be considered by the jury on the question of notice to the plaintiff of defects in the payee's title to the instrument. The N. I. L. was not cited on this point. Fidelity Trust Co. v. Whitehead, 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200. S. C. sec. 59.

A note payable one day after date is not overdue at any time on the day after its date. Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, S. C. sec. 25.

A provision that if a note payable in one year is not paid at maturity it may be extended, does not extend the note automatically if it is not paid when due. Therefore a transferee after the expiration of the first year is not a transferee before maturity in the absence of evidence of extension or renewal. The N. I. L. was not cited on this point. George v. Williams, 27 Colo App. 400, 149 Pac. 837.

The maker of a negotiable promissory note made payments on account thereof after maturity to the holder, an indorsee from the payee. Thereafter the holder transferred the note to plaintiff, who paid value, *bona fide*, and without notice of the payments, which had not been indorsed on the note. *Held*, that the rule that a purchaser after maturity takes subject to equities between the original parties has no application to equities affecting intermediate holders or indorsers, and that plaintiff could hold the maker. The N. I. L. was not cited. Reardon v. Cockrell, 54 Wash. 400, 103 Pac. 457, 50 L. R. A. (N. S.) 87.

It is submitted that this case is wrong. Payment to a holder after maturity is an equity which attaches to the instrument itself and travels with it into any hands, the instrument being then subject to the same defenses as if it were non-negotiable (section 58). The court was evidently thinking of set-offs and other defenses arising out of collateral matters as to which there was a conflict of authority, some courts holding that all such defenses travel with the instrument after maturity, whether between the original parties or between intermediate parties and the maker, other courts holding that only such defenses of the maker against the payee travel with the instrument. 1 Ames, Cases Bills & Notes, 759 n. See criticism of this case, Chafee, Rights in Overdue Paper, 31 Harvard Law Rev. 1123, n. 56.

Plaintiff indorsed a note in blank and delivered it to X to be used for a special purpose. X, for his own uses, sold and delivered the note to defendant after maturity. Plaintiff sued defendant in replevin to recover the note. *Held*, that, by indorsing the note and delivering it to X, plaintiff clothed X with the *indicia* of ownership, and that the purchaser without notice from X got good title, even though he bought after maturity. The N. I. L. was not cited. Priest v. Garnett (Mo. App.), 191 S. W. 1048. See comment following Justice v. Stonecipher, *infra*, p. 169.

A certificate of deposit, payable to order, twelve months from date was indorsed by the payee to the order of a stock broker, as security for a loan. The broker, without authority, indorsed it in blank after maturity and re-pledged it to the defendant bank as security for a larger amount than the original loan to the payee. *Held*, that the bank took the certificate free of secret equities affecting the title, and the payee can not recover it back on tendering merely the amount of the original debt. The N. I. L. was not cited in this case. Wolf v. American Trust & Savings Bank, 214 Fed. Rep. 761, 132 C. C. A. 410. *Semble*, that by the custom of merchants and bankers a time certificate of deposit after

maturity stands as a deposit, payable on demand, and that, though ripe for presentment, it should not be subject to the dishonor that attaches to a merchant's overdue commercial paper. *Ib.* As to the judgment in this case, see comment on Justice v. Stonecipher, *infra.* As to the *dictum,* although correct in principle, and according to the weight of previous authority, it is contrary to the provisions of the Negotiable Instruments Law, see sections 53 and 70, and comments *infra,* pp. 176, 177, and *infra,* pp. 256, 257.

In Justice v. Stonecipher, 267 Ill. 448, 108 N. E. 722, the plaintiff intrusted negotiable notes, made by third parties, payable to plaintiff and indorsed in blank to one S for safe keeping. S, without authority, pledged the notes after maturity to defendant to secure a loan to S made by defendant in good faith and without notice of plaintiff's rights. Plaintiff sued defendant for an accounting and for general relief. *Held,* on the authority of Young Men's Christian Assn., etc., Co. v. Rockford Nat. Bank, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, that plaintiff was not entitled to relief. The case cited as authority was upon an instrument made before the Negotiable Instruments Law was adopted in the state, as was also the similar case of Gardiner v. Beacon Trust Co., 190 Mass. 27, 76 N. E. 455, 2 L. R. A. (N.S.) 767, in which the same result was reached. But the principal case being upon an instrument made after the adoption of the Negotiable Instruments Law, it became necessary to consider the effect of the act upon this question as to which there had previously been a conflict of authority.[1] The Illinois court held that under section 59 the purchaser from one having defective title, had only the burden of bringing himself within the provision of the fourth clause of section 52, defining a holder in due course, that is, that he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it, thus ignoring the requirement of the second clause of section 52 that the purchaser should become a holder before the instrument was overdue. The title of S was certainly defective because he negotiated the instrument in breach of faith (section 55). Section 59 then made it necessary for the purchaser from S to show that he was a holder in due course, and to do this he must bring himself within the definition in section 52, and that he could not do, because he did not take before maturity. If the purchaser in such a case could hold the instrument, it must be on some principle of estoppel, in spite of the fact that he was not a holder in due course, and it is just the conflict on this question which the provisions of the act seem intended to abrogate. The only alternative seems to be to treat sections 52 to 59 inclusive as intending to apply only to defenses to obligations on the instrument, whether of parties primarily or secondarily liable, leaving the cases of equitable claims to ownership of the instrument

[1] Chafee, Rights in Overdue Paper, 31 Harvard Law Rev. 104; Francis R. Jones, Some Problems in Overdue Paper, 11 Harvard Law Rev. 40. See also, 1 Ames, Cases, Bills & Notes, 748 n.

to be dealt with as omitted cases, under section 196, that is in accordance with the law merchant of the respective states, in which case the former conflict would continue. Or the conflict might be settled and the law made uniform by an amendment such as the addition to section 57 suggested by Professor Chafee.[1]

ENGLAND—

A bill drawn for the acceptor's accommodation but which had never been negotiated was in the hands of the drawer after maturity, and having come into the possession of the drawer's solicitors, the latter claim a lien on it for services previously rendered the drawer in an action to recover the bill from a converter, and sued the acceptor on the bill. *Held*, that plaintiffs taking the bill overdue could acquire no rights against the acceptor. Redfern v. Rosenthal, 86 L. T. Rep. 855; see also, section 27(3). (N. I. L. sec. 27.)

"In his own right"[2] is not used merely in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.

A gave a demand note payable to B or order on the understanding that it should not be negotiated. B, however, indorsed the note for value to C. Afterwards A paid B the amount of the note. B then obtained the note from C by fraud and gave it to A. *Held*, that A was not a holder for value, the previous payment not being a consideration given when he received back the note, and he is still liable to C on the note. Nash v. DeFreville [1900], 2 Q. B. 72.

(*d*) Milius v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669, S. C. sec. 25; Fayette Nat. Bank v. Summers, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694.

The plaintiff purchased refunding bonds for twenty-five per cent. of their value, issued by the defendant to take up bonds which it had no authority to issue. The interest on these bonds had been in default for seventeen years, but a tax had been levied for two years prior to the plaintiff's purchase to pay the interest. The plaintiff was informed that he might have to sue on the bonds and that the defendant was compromising claims on such bonds, but he was advised by counsel that the bonds were validly issued. *Held*, error to direct a verdict for the defendant. The question of the plaintiff's *bona fides* should have been left to the jury. Doty v. Garfield Township, 89 Kan. 719, 133 Pac. 172.

Proof that the holder paid full value before maturity makes out a *prima facie* case of good faith. Hodge v. Smith, 130 Wis.

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[1] Chafee, Rights in Overdue Paper, 31 Harvard Law Rev. 1104, 1148, n. 138.

[2] See section 119-5, N. I. L.

326, 110 N. W. 192, *semble,* S. C. secs. 16, 55. But see Nat. Bank v. Foley, *infra,* section 59, *contra.*

That plaintiff took a note, indorsed without recourse, without knowing the makers and without making inquiry as to their financial condition, except of the payee, and paid only a little over half the face are facts to be considered by the jury in the question of plaintiff's *bona fides.* Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548.

A finding that plaintiff paid value but did not purchase a note before maturity in good faith does not negative his title, but only the *bona fides* of his purchase. Case v. Beyer, 142 Wis. 496, 125 N. W. 947. The N. I. L. was not cited in this case.

A purchaser of an unaccepted bill of exchange in good faith is as much a holder in due course as against a subsequent acceptor as if he had purchased after acceptance. Mt. Vernon Nat. Bank v. Kelling-Karel Co., 189 Ill. App. 375, S. C. sec. 28.

The jury was asked to decide whether the note against which the maker had an equity as against the payee had been sold to plaintiff for valuable consideration, before maturity, and the jury answered "We do not know." *Held,* that this answer was equivalent to "No." Iowa City State Bank v. Claypool, 91 Kan. 248, 137 Pac. 949.

The defendant must allege that at the time of notice of a defense to a note discounted by a bank, the money remained in the bank to the credit of the discounter. Richards v. Street, 31 App. Cas. D. C. 427.

The fact that a bank gave a provisional credit on deposit of a check does not make the bank a holder in due course. People's State Bank v. Miller, 185 Mich. 565, 152 N. W. 257, S. C. sec. 55.

A credit on an old account which does not discharge the debt or any part of it, or extend the time of payment, is not a valuable consideration for the transfer of a note. National Bank v. Foley, 54 Misc. Rep. 126, 103 N. Y. Supp. 553, S. C. secs. 25, 59. The court in this case erroneously followed the mistaken view of some New York cases, that the old rule, that a pre-existing debt is not value, is still the law of New York. See discussion under section 25, *supra,* pp. 103 *et seq.*

The mere crediting to a depositor's account of a check on another bank, where the account continues to be sufficient to pay the check if it be dishonored, does not make the bank a holder for value. Citizens' State Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765. For the English rule in this class of cases, see *supra,* section 25, p. 103.

But if the depositor has drawn out a sum equal to the amount of the check, the bank will be a holder in due course, although the balance is continually kept up by fresh deposits, because of the rule that the first debits are to be charged against the first credits. The N. I. L. was not cited on this point. Merchants' Nat. Bank v. Santa Maria Sugar Co., 162 App. Div. 248, 147 N. Y. Supp. 498, S. C. sec. 3-2, affirmed without opinion in 220 N. Y. 732.

But in Curry v. Wisconsin Nat. Bank, 149 Wis. 413, 136 N. W. 349, the court refused to apply this rule on the ground that it would work injustice under the circumstances. The plaintiff had left negotiable bonds with the A bank for safe keeping. An officer of the bank wrongfully pledged the bonds to secure his note to the B bank, which credited the amount to the A bank. There was a shifting balance between the two banks, but all the time the credit balance of the A bank exceeded the amount of the note. Upon failure of the A bank, plaintiff sued the B bank to recover the bonds. *Held,* that the B bank had a banker's lien on the balance of the A bank enforceable by set-off for the sum credited upon the discount of the notes, in addition to the pledged bonds as security. That the B bank was entitled to cancel the credit and charge the A bank with the amount and must surrender the bonds to plaintiff.

The plaintiff bank, purchaser of a note claimed to have been procured by fraud, proved that it bought the note from the payee and gave him credit for the amount on his checking account. *Semble,* that if there was such fraud as was claimed, the burden of proof was on the plaintiff to show that the payee was in its debt at the time of the credit or had drawn out the money and that failing to do so the bank was not a holder for value. The N. I. L. was not cited on this point. Standing Stone Nat. Bank v. Wilser, 162 N. C. 53, 77 S. E. 1006 S. C. sec. 59.

The crediting of the purchase price of a note by the buyer (a bank) to the seller is not giving value except to the extent of the money actually drawn and charged against the credit before notice. Hodge v. Smith 130 Wis. 326, 110 N. W. 192, S. C. secs. 16, 55; Albany Co. Bank v. People's Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773.

The discount of a note by a bank and the crediting of the amount to the account of the payee does not constitute the bank a holder for value, although the payee was indebted to the bank for more than the amount of the note, unless some other valuable consideration passes, such as the payment of checks drawn on the deposit or the application thereof to some obligation of the depositor. German-American Nat. Bank v. Lewis, 9 Ala. App. 352, 63 So. 741, S. C. secs. 30, 59.

A bank credited the amount of a note to the payee, who died insolvent the next day. *Held,* that the fact that at the time of his death the amount to his credit was less than the proceeds of the note did not prove the bank to be a holder for value to the extent of the difference, without evidence that the difference was caused by payment of an overdraft or other past due obligation of the payee, or payment of checks drawn by the payee. Consolidation Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353. *Sed quaere?* See dissenting opinion of Houghton, J.

A bank giving credit for the amount of a note is not a holder in due course of business when such credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals.

McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 15 Ann. Cas. 665, 125 Am. St. Rep. 265, S. C. secs. 55, 56; Tatum v. Commercial Bank & Trust Co., 185 Ala. 249, 64 So. 501, S. C. secs. 29, 59. See also, cases under section 25.

But if the bank assumes a legal obligation to a third person (promising to honor a check of the depositor) on the faith of the deposit or credit, it becomes a holder for value. Montrose Sav. Bank v. Claussen, 137 Iowa, 73, 114 N. W. 547.

A bank discounting a note and obtaining credit in favor of the seller in another solvent bank for the amount, is a holder for value. But the mere statement that such credit was given, when it does not appear how it was given or that it was ever used, is not enough to enable the court to determine whether the credit was real and substantial. Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068, S. C. secs. 34, 38.

But where plaintiff bought the note of one with whom he had money on deposit and the latter charged the amount against the deposit and plaintiff credited it to the seller, plaintiff was held to be a purchaser for value. Neither party had the power after the entry of the debit and credit items to change them. Griswold v. Davis, 125 Tenn. 223, 141 S. W. 205.

The payee of notes, given by defendant upon an illegal consideration, transferred them to plaintiff bank for a certificate of deposit, issued by the bank. *Held,* that plaintiff was not a holder for value, it not appearing that the certificate of deposit had been paid. The N. I. L. was not cited. Armstrong v. Walker (Ala.), 76 So. 280. If the certificate of deposit was negotiable, which, however, does not appear, the decision is clearly wrong.

Issuing a negotiable certificate of deposit is parting with value, especially where it has been negotiated to a holder in due course and subsequently paid. Elmore Co. Bank v. Avant, 189 Ala. 418, 66 So. 509, S. C. sec. 56.

To constitute a bank purchasing a note and placing the proceeds to the credit of the seller, a holder in due course, it is not necessary that it shall have paid out the whole of the deposit before notice. It is sufficient if the bank has surrendered securities, made advances or extended credit, or incurred obligations or liabilities on the faith of such deposit. Nat. Bank of Commerce v. Armbruster, 42 Okla. 656, 142 Pac. 393.

A bank purchased a draft with a bill of lading. The bank sent the draft with the bill of lading to the drawee, who paid the draft and received the bill of lading and the property covered by it. *Held,* that the bank became a holder for value, although it had merely credited the vendor with the amount, and it had not been checked against, and that the drawee, upon discovering that the property was defective, could not hold the bank. The N. I. L. was not cited. Tapee v. Varley-Wolter Co., 184 Mo. App. 470, 171 S. W. 19.

Where a bank discounts a draft and places the proceeds to the credit of the transferor, the bank is a purchaser for value if it re-

tains no rights to charge the transferor except on his indorsement in case the draft is not paid, but the bank is not a purchaser, but only an agent for collection, if by express or implied agreement, the bank has the right to charge back the draft if uncollected. Worth Co. v. International Sugar Feed Co., 172 N. C. 335, 90 S. E. 295. This case contains references to cases holding that the bank is not a purchaser for value if the drawer had at all times a considerable amount to his credit, and cases which hold that if an unqualified credit is given, it is as if money was paid and is a purchaser.

One X was indebted to plaintiff bank. X fraudulently obtained from defendant bank a draft, payable to the president of plaintiff bank individually, and delivered it to said president, who indorsed the draft to plaintiff bank, and delivered to X the evidence of his indebtedness and the securities therefor. The draft was not paid, and plaintiff bank, having learned of the manner in which the draft was obtained, repossessed itself of the notes and securities surrendered to X, and also took a mortgage from him agreeing that the proceeds of the draft, if collected, should be applied on X's indebtedness. *Held*, that plaintiff having lost nothing, and since any sum recovered on the draft would inure to X's benefit, the plaintiff could not hold defendant on the draft. It was further held, that the plaintiff bank was not a holder in due course, because its president paid nothing for the draft, and the bank having paid nothing to its president for the draft was not a holder for value. That the knowledge of its president, being knowledge of the bank, the bank knew that he had paid nothing for the draft. It is submitted that this ground of the judgment is erroneous. The bank did pay value for the draft on surrendering the notes and securities of X, and it was quite immaterial that nothing was paid to the president. He had no knowledge of X's fraud and the bank was therefore not affected thereby. If the draft had been payable to the bank, by the better view, and the great weight of authority, it would have been protected. That the legal title passed through its innocent president, as a conduit, should make no difference. On a rehearing, the court discussed, inadequately, the question whether a payee can be a holder in due course, but expressed no opinion on the question. First Nat. Bank v. Lyons Exchange Bank (Kan.), 164 Pac. 137.

ENGLAND—

The manager of a bank stole negotiable securities from the bank and pledged them with A. He afterwards got them back, with other negotiable securities from A by fraud, and replaced them in the bank. The bank knew nothing of the transaction. *Held*, that the bank was a holder in due course and entitled to keep the securities. London & County Banking Co. v. London & River Plate Bank, 21 Q. B. D. 535.

(*e*) The manager of a bank was indebted to the bank $76,000 on notes. The bank went into the hands of a receiver. The manager

by fraudulent representations induced a woman with whom he sustained confidential relations, to surrender a certificate of deposit in the bank for $61,000 and to give her promissory notes for $15,000 in payment of the manager's notes, which were surrendered by the receiver. *Held,* that the receiver is charged with constructive notice, is not a holder in due course and can not recover upon the notes for $15,000. Brown v. Miller, 22 Idaho, 307, 125 Pac. 981. It is submitted that the opinion of the dissenting judge is more correct and in accord with the weight of authority.

One is not to be deemed a holder in due course of a note unless it has been "negotiated" and transferred to him, either by indorsement or delivery, and one who merely claims an equitable interest can not be deemed a holder in due course so as to take free from defects under section 57. Pensacola State Bank v. Thornberry, 226 Fed. Rep. 611, 141 C. C. A. 367, S. C. sec. 152.

The president of a corporation, who knew that its stock was practically valueless and that a note indorsed to him as collateral had been given for such stock, was charged with knowledge of the infirmity of its consideration. The N. I. L. was not cited. Hamilton v. Mihills, 92 Wash. 675, 159 Pac. 887.

A bank knew, when it took from the seller of an automobile, notes executed by the buyer, that the car was sold under a warranty, and that the consideration might possibly fail. *Held,* that the bank was nevertheless a holder in due course. *Secus,* if the warranty had been broken and the bank knew of the breach at the time it took the notes. Baker State Bank v. Grant (Mont.), 166 Pac. 27; Barry v. Kinseley (Okla.), 155 Pac. 1168; Citizens' Bank v. Limpright, 93 Wash. 361, 160 Pac. 1046, S. C. sec. 27, accord.

A, the holder of three promissory notes for $2,500 each, transferred them to B by indorsement for property worth $6,000, and over her signature on one of the notes wrote, "On payment of the within note and interest Mrs. A is to receive $1,530 and interest from date." B indorsed the notes to defendant and also guaranteed payment of them. Defendant collected the notes and was sued by A for the $1,530 and interest. *Held,* that the memorandum on the note was sufficient to put him on inquiry as to A's interest in them and that he was not a holder in due course and was liable to plaintiff. Keisel v. Baldock (Okla.), 154 Pac. 1194. This case is distinguished from the cases cited under section 56. There the question involved the effect of extrinsic evidence as putting a purchaser on inquiry, the test being not what a prudent man might do, but of actual good faith. But it would not be in accord with public policy to permit a purchaser to plead ignorance or misunderstanding or failure to comprehend the meaning of anything written on the instrument itself.

One who takes a certificate of deposit with the words "payment refused" stamped on the face is not a holder in due course. State v. Greenville Bank (Mo. App.), 187 S. W. 597.

Where the agent of the maker upon delivering the note showed to the holder a letter vesting in the agent only a limited and spe-

cial authority, the holder could not became a holder in due course, unless the note was delivered to him in accordance with the agent's instructions: Cheney v. Taber, 221 Mass. 332, 108 N. E. 1072.

Upon evidence that the note, which was payable on demand, was transferred to the plaintiff, with indorsements showing payment nearly in full and with knowledge on his part that there was a dispute between the maker and the payee as to the amount due thereon, the plaintiff was held not a holder in due course. Brophy Grocery Co. v. Wilson, 45 Mont. 489, 124 Pac. 510.

A note was delivered on a condition, that if at any time the maker found herself unable to pay the note, she might rescind the contract of sale under which it was given, return the property and have the note cancelled. *Held*, that an indorsee with knowledge of this condition is not a holder in due course. Laing v. Hudgens, 62 Misc. Rep. 388, 143 N. Y. Supp. 763.

The defendant, who had contracted for the erection of a building on his land, made certain payments to the contractor by checks drawn to the latter's order and marked ,"On contract." The contractor indorsed these checks to the plaintiff, a dealer in plumbers' supplies, from whom he obtained his supplies and who was in the habit of keeping separately the contractor's accounts for material furnished on different jobs. The proceeds of these checks were applied partly on the account for materials furnished for the defendant's building and partly on old accounts of the contractor. In a suit to enforce a materialman's lien against the defendant's building, *held*, that the defendant is entitled to have the entire amount of such checks credited on the accounts for materials furnished for such building. Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633.

Where a note payable to a bank has been delivered to the cashier on a condition, it was the duty of the cashier to notify the bank that the delivery was conditional and the bank is chargeable with his knowledge. Union Investment Co. v. Epley, 164 Wis. 438, 160 N. W. 175, S. C. sec. 16.

Sec. 53. When Person Not Deemed Holder in Due Course.

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.[1]

[1] "Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue." B. E. A. s. 86 (3). "A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section (relating to transfer) where it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact." B. E. A. s. 36 (3). The same rule would apply to a check. B. E. A. s. 73.

See *infra*, section 193, for special provision in South Dakota fixing the maturity of demand instruments.

It has been suggested [2] that this section should be amended by interpolating after the words "on demand" the words "other than bank notes and certificates of deposit," since bank notes have never been held due without demand so as to charge the maker, and the great weight of authority was the same as to certificates of deposit. And no passage of time before demand should be regarded as a dishonor as to an indorser which would not be so as to a maker. See further discussion under section 70.

(*a*) Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14, S. C. secs. 25, 52.

A note payable on demand is due (for purposes of negotiation) within a reasonable time after its date, and there are practically no authorities which hold that such a reasonable time can be extended beyond a year. McAdam v. Grand Forks, etc., Co. 24 N. D. 645, 140 N. W. 725, 47 L. R. A. (N. S.) 246.

A demand note, negotiated an unreasonable time after its date, proclaims to all the world "I have been dishonored. Take me at your peril." What constitutes an unreasonable delay depends on "the facts of the particular case" (section 193). Where the negotiation was after seven months from issue, *held*, that the defendant was entitled to have the question submitted to the jury. *In re* Estate of Philpott, 169 Iowa, 555, 151 N. W. 825, S. C. secs. 14, 52.

Sixteen months is not an unreasonable time where payments of monthly interest were made to the payee and also to plaintiff after he took the instrument. McLean v. Bryer, 24 R. I. 599, 54 Atl. 373, S. C. sec. 64-1.

Five days between the issue and negotiation of a cashier's check is not an unreasonable time, such a check, whether certified or not, being a bill of exchange payable on demand. Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 59, 185.

A check dated and issued on one day and negotiated at noon the next day is not overdue so as to convey notice to the indorsee of its illegality or of its previous dishonor. Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 25, 56, 186.

A check drawn on Saturday and negotiated on the following Monday was not overdue. Asbury v. Taube, 151 Ky. 142, 152 S. W. 372, S. C. sec. 59.

This section repeals the former statute whereby a demand note was overdue immediately for purposes of transfer so as to let in

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[2] Brannan, Some Necessary Amendments of Negotiable Instruments Law, 26 Harvard Law Rev. 589, 590.

equities. Therefore a check invalid in the hands of the payee because delivered on Sunday is good in the hands of a *bona fide* purchaser for value without notice and within reasonable time. Gordon v. Levine, 197 Mass. 267, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361, S. C. sec. 186.

Sec. 54. Notice Before Full Amount Paid.

Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.[1]

This section codifies the law,[2] but it is submitted that the theory which it expresses is erroneous and contrary to the principle underlying section 57. Suppose a note for $200 against which the maker has an equity of fraud as against the payee. It is sold by the payee for $150 to the plaintiff, a *bona fide* purchaser without notice, upon terms of payment of $100 cash and $50 in a month. Within the month plaintiff is notified of the equity. How much should plaintiff recover of the maker? The section says $100, thereby depriving plaintiff of the benefit of his bargain. On the other hand suppose plaintiff had paid the whole consideration of $150 before receiving notice. In this case plaintiff, under section 57, recovers $200, the full amount of the note, thus receiving the benefit of his bargain. There is no reason for the difference except that there had been a conflict of authority as to the second case but not as to the first.

Legally, the plaintiff being a *bona fide* purchaser for value should recover the full amount of the note. But the fraudulent payee was constructive trustee of the note for the defendant maker. In exchange for the note the payee received from the plaintiff $100 cash and plaintiff's obligation to pay $50 in a month. The payee then held this obligation and the $100 in trust for the maker. When the plaintiff is notified of the trust, his obligation is not increased in amount, only he must not pay the unpaid amount to the payee, but must hold it for the maker, who is the beneficiary, and if he pays the trustee after notice he can not recover that amount from the maker. The result is that plaintiff should recover $200, the full amount of the note less any part of the amount he agreed to pay but has not paid before notice. That

[1] Not in B. E. A.

[2] Dresser v. Railway Construction Co., 93 U. S. 92.

amount is $50. The plaintiff therefore should recover $200 less $50, or $150. The case may be more briefly put in this way. The plaintiff is the holder in due course of a note for $200 and is legally entitled to recover that amount. But after notice of the trust he must hold subject to that trust his obligation to pay $50 to the trustee, and the maker is entitled to an equitable set-off of that amount as against plaintiff's legal right of action for $200.

Goetting v. Day, 87 N. Y. Supp. 510, S. C. sec. 56; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Bank of Morehead v. Hernig, 220 Pa. 224, 69 Atl. 679; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192, S. C. secs. 16, 52-3, 55; *In re* Continental Engine Co., 234 Fed. Rep. 58, 148 C. C. A. 74, S. C. sec. 16.

Where a bank discounted a note and placed the proceeds to the credit of the depositor, *quaere* whether the mere fact that the note was not paid when due is such notice of defect of title of the depositor as to make the subsequent payment of the balance of the proceeds a wrongful payment. Albany County Bank v. People's Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773.

There should be no doubt of the bank to recover, not only the amount paid before, but also the amount paid after maturity, if the bank had no notice of the defect of the depositor's title. Bancroft v. McKnight, 11 Richardson (Law), 663; Spering's Appeal, 10 Barr, 235.

Where the plaintiff purchased three notes before maturity in good faith and without notice of a defense of fraud, and gave his indorser three checks for one-half the face value of the notes, retaining the other half as security for the payment of the notes, in an action against the maker on one of the notes, plaintiff is entitled to recover one-half its face value. Rosenbaum v. Roth, 164 App. Div. 617, 150 N. Y. Supp. 396.

The defendant indorsed a note on condition that it should not be negotiated until another indorser had been procured. The maker nevertheless negotiated it to the plaintiff who paid part in cash, part by a negotiable draft purchased from a bank by plaintiff and retained part of the consideration. Subsequently the defendant notified the plaintiff's agent that the note had been negotiated in violation of the condition. *Held*, that the plaintiff can not recover subsequent payments on the note, but can only recover the amount of the cash paid to the maker and the amount paid for the draft. The draft being out of his control, plaintiff was not bound to stop payment on it. The violation of the condition was a good defense against any but a holder in due course. Notice to the agent was notice to the principal. But knowledge that the maker was financially embarrassed was not sufficient to put the purchaser on inquiry as to the indorsement. The N. I. L.

was not cited. Baruch v. Buckley, 167 App. Div. 113, 151 N. Y. Supp. 853.

Plaintiff in good faith gave his negotiable check in payment for a note made by defendant. Before the check had been paid, plaintiff was notified of an infirmity in the note. The check was subsequently presented and paid. *Held*, that plaintiff was a holder in due course, that he was not bound to stop payment of the check and was entitled to recover the amount of the note. Miller v. Marks, 46 Utah, 257, 148 Pac. 412, S. C. secs. 56, 59. See also, Matlock v. Scheureman, *supra*.

In First Nat. Bank v. Buffalo Brewing Co., 154 N. Y. Supp. 765, bonds, with interest coupons attached, were assigned to plaintiff (whether by indorsement or not does not appear) as collateral security for a debt, and it was arranged that plaintiff should collect the proceeds of the coupons, as they matured, and apply the moneys to the debt. The court said that the plaintiff was a holder in due course of such coupons only as are applied to the debt before any notice of a defect in the title thereto is brought home to the plaintiff. It is submitted that if the bonds were negotiable, and payable to bearer or indorsed, and were pledged for a debt, the plaintiff at once became a holder in due course of the bonds and all the coupons to the extent necessary to pay the debt, and his title was not affected by any subsequent notice of a defect. If notice before the application of the proceeds of a coupon would impair plaintiff's title to the coupon, in like manner, notice before the maturity and application of the principal of the bond would impair the plaintiff's title to the bond. Such a rule would make pledges of negotiable instruments of doubtful value as security.

Sec. 55. When Title Defective.

The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto,[1] by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

The Kansas Act reads "alleged consideration," a clerical error.

The Wisconsin Act (section 1676-25) adds the following: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the

[1] The English Act uses the words "the acceptance thereof" instead of "any signature thereto." B. E. A. s. 29 (2).

nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

Under this Wisconsin amendment an accommodation note signed by defendant, when so intoxicated as wholly to destroy the rational faculties of his mind, is absolutely void. And negligence in getting drunk does not estop defendant. Signing a note is not a usual or probable result of drunkenness, though bodily harm or death may be. Green v. Gunster, 154 Wis. 69, 142 N. W. 231; reviewed in 27 Harvard Law Rev. 164, also in 20 Case and Comment, 477.

In a case covered by this clause the note is void not only as to the maker so defrauded, but also as to all the other makers. Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212. *Cf.,* Arnd v. Sjoblom, *infra,* sec. 57.

The Minnesota Act has the following additional section:

"6015. Instrument obtained by fraud.—No person, nor the heirs of personal representatives of any person, whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the law merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury."

In Stevens v. Pearson (Minn.), 163 N. W. 769, defendant's signature was procured by fraud to a paper which was apparently only an order, but which, in fact, was an order with a note at the bottom, with the paper perforated in such a way that the note could be detached, and above the perforation in fine print were the words, "The attached note is tendered in settlement of this order and the company (payee) is authorized to detach the same when the order is approved and shipped." The court, citing the above section 6015, found that the plaintiff who bought the detached note was chargeable with notice of the fraud and also that the jury was justfied in finding that defendant, a woman of small business experience, was not guilty of negligence in signing the document, which was complicated and contradictory in its terms.

Johnson Co. Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132, S. C. sec. 52; Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805; McNight

v. Parsons, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. secs. 52-3, 56; Bank of Bushnell v. Buck Bros., 161 Iowa, 362, 142 N. W. 1004, S. C. sec. 59; *In re* Philpott's Estate, 169 Iowa, 555, 151 N. W. 825, S. C secs. 14, 53; Groh's Sons v. Schneider, 34 Misc. Rep. 195, 68 N. Y. Supp. 862, S. C. *supra*, sec. 52; Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. Supp. 1043, S. C. sec. 59; German-American Bank v. Cunningham, 97 App. Div. 244 89 N. Y. Supp. 836; Broderick, etc., Co. v. McGrath, 81 Misc. Rep. 199, 142 N. Y. Supp. 497, S. C. sec. 25; Bank of Morehead v. Hernig, 220 Pa. 224, 69 Atl. 679; Yakima Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119; Hynes v. Plastino, 45 Wash. 190, 87 Pac. 1127; Citizens' Bank v. Limpright, 93 Wash. 361, 10 Pac. 1046, S. C. secs. 27, 52; Wood v. Babbitt, 149 Fed. Rep. 818.

Parol evidence is admissible as between the parties and others not holders in due course to show an agreement that the instrument shall not be negotiated. Holdsworth v. Blyth & Fargo Co., 23 Wyo. 52, 146 Pac. 603; McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265, 15 Ann. Cas. 665, 22 L. R. A. (N. S.) 718, S. C. secs. 52, 56; Beach v. Nevins, 162 Fed. Rep. 129, 89 C. C. A. 129, 18 L. R. A. (N. S.) 288; Benton v. Sikyta, 84 Neb. 808, 122 S. W. 60, 24 L. R. A. (N. S.) 1057, *contra, semble.*

An oral agreement that a note written at the foot of a written order for goods shall not be negotiable is admissible, so as to throw the burden of proof upon an indorsee, to whom the note was negotiated, to show that he is a holder in due course under section 59, although the order provides that the seller "is authorized to detach the note when the order is accepted or will be returned to the customer (the maker) if the order is not accepted." Holdsworth v. Blyth & Fargo Co., 23 Wyo. 52, 146 Pac. 603.

The title of the payee of a note is defective where the only consideration is accrued interest on a loan previously made at an unlawful rate of interest. Keene v. Behan, 40 Wash. 505, 82 Pac. 884.

Brokers employed to buy stock represented that they had bought the stock and received a check therefor, but had not in fact bought. *Held*, that their title to the check was defective within this section. People's State Bank v. Miller, 185 Mich. 565, 152 N. W. 257, S. C. sec. 52.

The plaintiff gave money to A to buy land for plaintiff and to pay off a past due note, secured by mortgage on the land. A bought the land, which was deeded to plaintiff, but A took the note, indorsed without recourse, from the owner, and had the mortgage assigned to B. A later sold the note to defendant and had B assign the mortgage to defendant. Upon discovery of the facts, plaintiff sued defendant to clear the record of the mortgage. *Held*, that A acted fraudulently in taking the note and mortgage for himself and his negotiation thereof was in breach of faith and that

plaintiff was entitled to the relief claimed as against the defendant, who bought after maturity. Northwestern Improvement Co. v. Rhoades, 52 Mont. 428, 158 Pac. 832.

Defendant bank paid its cashier's check to an indorsee of the payee after notice that the indorsement had been made in an unlawful gambling transaction. *Held,* that the bank was liable over again to the payee, although the statute against gambling did not in express terms declare gambling contracts void. Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724.

The negotiation of a negotiable note which was given in part payment for lands, with an agreement that if the maker was dissatisfied upon inspection the payee would return the note, is not such fraud as will throw on a purchaser of the note the burden of showing that he is a holder in due course. The N. I. L. was not cited. Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643, S. C. secs. 3-2, 25.

A breach of warranty on a sale of personalty is not a defense to a note for the price, but must be pleaded as a counterclaim, and if not so pleaded, and no fraud by the seller is alleged in the answer in an action on the note by an indorsee, it is immaterial whether the indorser was an innocent purchaser. The N. I. L. was not cited. First Nat. Bank v. Sayer, 35 S. D. 581, 153 N. W. 652.

The maker of a note payable to his own order indorsed it in blank and delivered it to F to get it discounted for the maker's benefit. F delivered the note to P, and P delivered it to A for the same purpose. A kept the note. The maker sued A for cancellation thereof. *Held,* that there was a fraudulent diversion and that the burden of proof was on A to show that he was a *bona fide* holder for value. Peterson v. Alton, 162 App. Div. 21, 147 N. Y. Supp. 280.

But in Demelman v. Brazier, 198 Mass. 458, 84 N. E. 856, S. C. sec. 118, it was held, that where the defendant indorsed a note and intrusted it to X to negotiate and give a part of the proceeds to defendant, and X retained the proceeds, it is a question for the jury whether X acted with fraudulent intent from the beginning, so as to constitute a fraudulent negotiation, or merely embezzled the money subsequently.

If one of the signatures of several makers is obtained by fraud so as to make the title of the payee defective as to him, it will be defective as to the other makers also, since the equality of burden is thus disturbed and increased as to them. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192, S. C. secs. 16, 52-3; Schmidt v. Bank of Commerce, 234 U. S. 64, 34 S. C. Rep. 730 (reversing the same case, *sub nomine,* Bank of Commerce v. Broyles, 16 N. M. 414, 120 Pac. 670, 58 L. ed. 1214), *accord.* In First Nat. Bank v. Shaw, 157 Mich. 192, 121 N. W. 811, a case on an instrument made before the N. I. L. was adopted, it was held, that, where the signatures of some of the makers were forged, a holder in due course could nevertheless recover against those who signed. And this would, of course, be equally true under the N. I. L.

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X owed plaintiff. In order to provide funds to pay the debt, defendant at X's request drew a check payable to X or order, which X was to pay into his bank to meet his check for the same amount to plaintiff. X indorsed the defendant's check, paid it into his bank and gave his own check to plaintiff. Defendant changed his mind and stopped his check, whereupon X stopped his check and indorsed and delivered defendant's check to plaintiff who had notice of its dishonor. *Held,* that as the check was an accommodation bill and plaintiff, even assuming that he gave consideration for it, not being a holder in due course, since he took the check with notice that it had been dishonored, took it subject to any defect of title at the time of dishonor, and as X had negotiated it to plaintiff in breach of faith, there was a defect of title attaching to it and the plaintiff could not recover. Hornby v. McLaren (C. A., March 31, 1908), 24 T. L. Rep. 494.

An overdue bill indorsed in blank was sold in Norway on a judicial proceeding against one of several joint owners of the bill. By the laws of Norway the purchaser acquired a good title as against the equity of the other joint owners. *Held,* that although the bill was drawn and payable in England, section 36(2)[1] of the Bills of Exchange Act was not applicable and the purchaser was entitled to the bill. Alcock v. Smith [1892], 1 Ch. 238.

In this case Lindley, J. (p. 263), said that " 'defect of title' is a phrase introduced into the Bills of Exchange Act in lieu of the old expression 'subject to equities,' which is an expression not adopted, because the Act applies to Scotland as well as to England, and 'subject to equities' is an expression not known to Scotch law."

It has sometimes been held that illegality ceases to be a real defense under the N. I. L. unless made so by a subsequent statute, and that the statutes previously in force declaring void instruments given for gaming or upon usurious interest or other forbidden transactions are impliedly repealed by the N. I. L. Wirt v. Stubblefield, 17 App. D. C. 283; Schlesinger v. Kelly, 114 App. Div. 546, 99 N. Y. Supp. 1083 (usury), per opinion of Laughlin, J., distinguishing Strickland v. Henry, *supra,* sec. 29; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 419, 95 N. Y. Supp. 63 (usury), *semble;* Schlesinger v. Lehmaier, 191 N. Y. 69, 73, 83 N. E. 657, 658, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591, *semble;* Klar v. Kostiuk, 65 Misc. Rep. 199, 119 N. Y. Supp. 683 (usury), S. C. sec. 66; Horowitz v. Wollowitz, 59 Misc Rep. 520, 110 N. Y. Supp. 972 (usury), S. C. sec. 66; Olser & Co. v. Behrend, 89 Misc. Rep. 391, 151 N. Y. Supp. 873; Wood v. Babbitt, 149 Fed. Rep. 818, 822 (usury), *semble.* See also, the opinion of Willard Bartlett, J., in Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619 (usury), *accord.* But the opinion of Cullen, C. J., in the last-mentioned case is *contra,* and so also are the following cases: Alexander v. Hazel-

[1] See *infra,* p. 551.

rigg, 123 Ky. 677, 29 Ky. Law Rep. 1212, 97 S. W. 353 (gaming); Holzbog v. Bakrow, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) 1023, *semble;* Lawson v. First Nat. Bank (Ky.), 31 Ky. Law Rep. 318, 102 S. W. 324, holding that a statute making void a peddler's note unless indorsed with the words "Peddler's note," is not repealed by implication by the N. I. L.; McAfee v. Mercer Nat. Bank (Ky.), 31 Ky. Law Rep. 863, 104 S. W. 287, accord (*cf.*, Arnd v. Sjoblom, *infra*, sec. 57); Perry Savings Bank v. Fitzgerald, 167 Iowa, 446, 149 N. W. 477 (usury); Raleigh Co. Bank v. Poteel, 74 W. Va. 511, 88 S. E. 187 (stipulation for attorney's fees in note), S. C. sec. 2-5, *semble;* Twentieth Street Bk. v. Jacobs, 74 W. Va. 525, 82 S. E. 320 (gaming); Askridge v. Thomas (W. Va.), 91 S. E. 7 (usury); *In re* Valecia Condensed Milk Co., 233 Fed. Rep. 173 (bonds made void by statute); Martin v. Hess, 23 Pa. Dist. Ct. 195, 71 Legal Intelligencer, 148 (gaming); Crusins v. Siegman, 81 Misc. Rep. 357, 142 N. Y. Supp. 348 (usury); Sabine v. Paine, 166 App. Div. 93, 151 N. Y. Supp. 735, affirmed, 223 N. Y. 401, 119 N. E. 849, S. C. secs. 29, 57, 66 (usury). But see Kennedy v. Heyman, 167 N. Y. Supp. 311, S. C. secs. 29, 57.

In Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479, a note given for a stallion, and, not containing words stating the consideration, as required by statute, was held void as between the parties; but as plaintiff had notice of the consideration, the question of the effect of the N. I. L. was not considered.

In Sampson v. Ward, 147 Wis. 48, 132 N. W. 629, plaintiff sold land to X and took in part payment a note made by defendant to one Y upon the sale of a stallion, but the note did not state the consideration as required by statute. The note was indorsed by Y and by X. At the time plaintiff took the note he had no notice of the consideration. Subsequently X paid the balance due for the land and received his deed from plaintiff. *Held,* that the note was not void as to a holder in due course, that plaintiff was such a holder even though he received notice of the consideration before Y paid the unpaid balance and received his deed.

In Benton v. Sikyta, 84 Neb. 808, 122 N. W. 1057, 24 L. R. A. (N. S.) 1057, a note given for a patent right but not so stating on its face, contrary to the statute, was held to be void between the parties and purchasers with notice.

The fact that part of the consideration of a negotiable promissory note was the assignment of a saloon license, which a statute declared should not be assignable, does not make such note void in the hands of a holder in due course. Farmers' Sav. Bank v. Reed, 192 Mo. App. 344, 180 S. W. 1002. It is to be observed that, in the four cases last cited, the statutes did not expressly or by necessary implication, make the instrument void, but merely declared the instrument or the transaction out of which it arose illegal. See also, cases under section 60.

A negotiable instrument obtained by duress is not void but only voidable and is valid in the hands of a holder in due course. State v. Wegener (Iowa), 162 N. W. 1040.

It is submitted that the weight of authority and the better reasoning is in favor of the view that the Negotiable Instruments Law does not impliedly repeal statutes which expressly or by necessary implication declare an instrument void. Sections 55 and 57 are those chiefly relied upon in favor of the contrary view, but they do not seem to compel this conclusion. If an instrument is made void by statute, then it is as if there were no instrument at all, and, as was said in the case of Martin v. Hess, *supra,* where section 57 was relied upon by counsel for the plaintiff, "that this act was not intended to inject life into a written instrument that by law was null and void *ab initio* is apparent from the use of the word 'liable' in section 57 in this act. * * * The liability is defined to be the state of one who is bound in law and justice to do something which may be enforced by action; Bouvier, p. 206. The maker of a note given in payment of a gambling transaction is not liable on such instrument, as by law such an instrument is null and void and of no effect."

The view of those courts which hold that illegality is not a real defense under the Negotiable Instruments Law would necessary result in changing the law in those cases in which a person, without negligence, has signed an instrument, which was, in fact, a negotiable instrument, but was deceived as to the character of the instrument and without knowledge of it. In such cases, there is no contract because there was no consenting mind, but the signer may be estopped by negligence to deny knowledge of the character of the instrument which he has signed. If he was not negligent he is not liable.[1] All the cases of this kind which have arisen, both in England and this country, since the adoption of the Bills of Exchange Act and the Negotiable Instruments Law, adhere to this rule. In England it was held, in the case of Lewis v. Clay, 14 T. L. R. 149, that the case of Foster v. McKinnon, L. R. 4 C. P. 704, is still law, under the provisions of the Bills of Exchange Act, which are in this respect substantially the same as those of the Negotiable Instruments Law. In this country are the following cases decided since the adoption of the Negotiable Instruments Law.

One, who, without negligence, signs a negotiable promissory note believing it to be an instrument of another character, is not bound thereon, even though it has passed into the hands of a holder in due course. Foster v. McKinnon, L. R. 4 C. P. 704, cited and quoted from, but not citing the N. I. L.; First Nat. Bank of Shenandoah v. Hall, 169 Iowa, 218, 151 N. W. 120; Bothell v. Miller, 87 Neb. 835, 128 N. W. 628, not citing the N. I. L. These cases reach the same result as the Wisconsin amendment, *supra,* p. 180, without such an addition to the section.

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[1] Even on the objective theory of mutual assent, it is essential that a promisor shall have intended to do the act on the basis of which it is asserted that he has entered into a contract. See Williston, 14 Ill. L. Rev. 525.

But if the defendant was negligent in signing the instrument the rule is otherwise. The makers of a note testified that they signed the note without reading it, believing that it was an agreement to form an association to buy a horse, although they had an opportunity to read the paper. *Held,* that they were guilty of such gross negligence that the court could direct a verdict in favor of the plaintiff, a holder in due course. Van Slyke v. Rooks, 181 Mich. 88, 147 N. W. 579, S. C. sec. 56.

One, who induced by misrepresentations as to the character of the instrument, signed a promissory note attached to a contract without reading it, which contract stated in legible type that the installment note below was to be detached, is liable to a holder in due course. Munnich v. Jaffe, 164 App. Div. 30, 149 N. Y. Supp. 338.

Sec. 56. What Constitutes Notice of Defect.

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.[1]

Sample v. Tennessee Valley Bank (Ala.), 76 So. 936; Holland Banking Co. v. Booth, 121 Ark. 171, 180 S. W. 978; Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182, 73 Pac. 873; Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132, S. C. sec. 52; Johnson v. Buffalo Bank, 134 Iowa, 731, 112 N. W. 165, S. C. sec. 42; Childs v. Billiter, 144 Ky. 53, 137 S. W. 795; Harrison v. Ford, 158 Ky. 467, 165 S. W. 663; Farmers' Bank of Lynnville v. First Nat. Bank, 164 Ky. 548, 175 S. W. 1019; Citizens' Trust, etc., Co. v. Hays, 167 Ky. 560, 180 S. W. 811, S. C. sec. 1; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624; Miller v. People's Sav. Bank (Mo. App.), 186 S. W. 547; Groh's Sons v. Schneider, 34 Misc. Rep. 195, 68 N. Y. Supp. 862, S. C. sec. 52; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; Siegmeister v. Lispenard Co., 107 N. Y. Supp. 158; Albert v. Hoffman, 64 Misc. Rep. 87, 117 N. Y. Supp. 1043, S. C. sec. 12; Coffin v. Tevis, 164 Misc. Rep. 314, 149 N. Y. Supp. 986; Rainbaut v. Tevis, 164 App. Div. 324, 149 N. Y. Supp. 993; Interboro Brewing Co. v. Doyle, 165 App. Div. 646, 151 N.

[1] Not in B. E. A. "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not." B. E. A. s. 90.

Y. Supp. 325; Sabine v. Paine, 166 App. Div. 9, 151 N. Y. Supp. 735, S. C. secs. 29, 55, 57, 66; Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308; Triphonoff v. Sweeney, 65 Ore. 209, 130 Pac. 979, S. C. sec. 12; Yakima Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119; Johnson County Sav. Bank v. Rapp, 47 Wash. 30, 91 Pac. 382; Gray v. Boyle, 55 Wash. 578, 104 Pac. 828; Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479; *In re* Hopper-Morgan Co., 156 Fed. Rep. 525; Brent v. Simpson, 238 Fed. Rep. 285, 151 C. C. A. 301.

This section simply reiterates a rule of the common law. Arnd v. Aylesworth, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638, S. C. sec. 59.

The rule of this section applies to all classes of persons, artificial as well as natural. Cox & Sons Co. v. North Brewing Co., 245 Pa. 418, 91 Atl. 859, Ann. Cas. 1916A, 86, S. C. sec. 29.

It is not material that an indorsee's denial that the instrument was obtained by fraud was insufficient where he had sufficiently denied knowledge or notice of the fraud. Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291.

The question of good faith is one of fact for the jury. Winter v. Hutchins, 20 Idaho, 749, 119 Pac. 883.

Where the testimony of the plaintiff's *bona fides* is undisputed, it is the duty of the court so to charge the jury; and that question should not be submitted to them. Van Slyke v. Rooks, 181 Mich. 88, 147 N. W. 579, S. C. sec. 55.

The evidence being positive, certain and in no way contradicted, that plaintiff paid value in the usual course of business, *bona fide* and without notice, a verdict of the jury and judgment of the lower court thereon in favor of the defendant was reversed by the Supreme Court. Southwest Nat. Bank v. Baker, 23 Idaho, 428, 130 Pac. 799.

The question whether the facts have any fair tendency to show bad faith is one of fact and not of law, especially where the evidence of fraud is sufficient to put the burden of showing good faith on the indorsee. McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 15 Ann. Cas. 665, 125 Am. St. Rep. 265, S. C. secs. 52-3, 55.

In order to direct a verdict for the holder of a note procured by fraud of the transferor, there must be a showing so conclusive that fair-minded men could draw no other inference than that the holder acquired the note without knowledge of the fraud practiced on the maker, and also without knowledge of such facts, as that if taken as true, the holder must have acted in bad faith. German-American Nat. Bank v. Kelley (Iowa), 166 N. W. 1053.

Merely suspicious circumstances sufficient to put a prudent man on inquiry, or even gross negligence on the part of plaintiff, at the

time of acquiring the note, are not sufficient of themselves to prevent recovery unless the jury find from the evidence that plaintiff acted in bad faith. Valley Savings Bank v. Mercer, 97 Md. 458, 55 Atl. 435; Hutchins v. Langley, 27 App. D. C. 234; Holland Banking Co. v. Booth, 121 Ark. 171, 180 S. W. 978; Vaughn v. Johnson, 20 Idaho, 669, 119 Pac. 879; Peterson v. Emery, 124 Ill. App. 294, S. C. sec. 124; Bright Nat. Bk. v. Hatman (Ind. App.), 109 N. E. 847; Colvert v. Harrington (Ind. App.), 112 N. E. 249, S. C. sec. 38; First Nat. Bank v. Garner (Ind.), 118 N. E. 813; People's Bank v. Reid, 86 Kan. 245, 120 Pac. 339; Montenegro-Ruhm Co. v. Ill. Trust & Sav. Bk. (Ky.), 176 S. W. 32; Van Slyke v. Rooks, 181 Mich. 88, 147 N. W. 579, S. C. sec. 55; Central Bk. v. Lyda (Mo. App.), 191 S. W. 245; Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588, S. C. sec. 59; Link v. Jackson, 164 Mo. App. 195, 147 S. W. 1114; State Bk. v. Cape Girardeau Co., 172 Mo. App. 662, 155 S. W. 1111, S. C. sec. 27; Benton v. Sikyta, 84 Neb. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; Dorsey v. Wellman, 85 Neb. 262, 122 N. W. 989; Aldrich v. Peckham, 74 N. J. L. 711, 68 Atl. 345; Rice v. Barrington, 75 N. J. L. 807, 70 Atl. 170; Davis v. Clark, 85 N. J. Law 696, 90 Atl. 303; Ketcham v. Govin, 35 Misc. Rep. 375, 71 N. Y. Supp. 991; Ironbound Trust Co. v. Schmidt-Dauber Co., 102 Misc. Rep. 708, 169 N. Y. Supp. 524; Cole v. Harrison, 167 N. Y. App. Div. 336, 153 N. Y. Supp. 250; Olmer v. Grouch, 168 App. Div. 874, 154 N. Y. Supp. 612; A. E. McBee Co. v. Shoemaker, 174 App. Div. 291, 160 N. Y. Supp. 251; First Nat. Bk. v. Stover, 21 N. M. 453, 155 Pac. 905, S. C. sec. 184; Smathers v. Toxaway Hotel Co., 162 N. C. 346, 78 S. E. 224, S. C. 167 N. C. 469, 83 S. E. 844; Johanna v. Lennon (N. D.), 755 N. W. 685; Security Trust Co. v. Gluckman (Okla.), 150 Pac. 908; Lambert v. Smith (Okla.), 157 Pac. 909, 911; Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 25, 53, 186; Johnson Co. Sav. Bank v. Kock, 38 Pa. Super. Ct. 553; Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641, S. C. sec. 57; Fleshman v. Bibb, 118 Va. 582, 88 S. E. 64, S. C. sec. 32; Gray v. Boyle, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042; Scandinavian Am. Bk. v. Johnson, 63 Wash. 187, 115 Pac. 102; Citizens Bk. v. Limpright (Wash.), 160 Pac. 1046; Schultz v. Crewdson (Wash.), 163 Pac. 734; Kipp v. Smith, 137 Wis. 234, 118 N. W. 848; Postal Tel-Cable Co. v. Citizens Nat. Bk., 228 Fed. Rep. 601, S. C. secs. 62, 126.

But if the purchaser does in fact suspect and fails to make investigation lest it disclose a defense, he is not a purchaser in good faith. Walters v. Rock (N. D.), 115 N. W. 511; Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237, S. C. sec. 4. *Contra,* Youle v. Fosha, 76 Kan. 20, 90 Pac. 1090, *semble.*

In Scandinavian Bank v. Johnston, 63 Wash. 187, 115 Pac. 102, the court said, *obiter*, that it is well established that "mere suspicion of an infirmity is insufficient to put the indorsee upon inquiry or to show that he is not a holder in good faith." If the court meant to say that, although the plaintiff himself actually suspected that there was an infirmity and made no inquiry, he could yet be a holder in good faith, it is submitted that this is erroneous, and that no case has been found which so decides, although similar language is used in some cases. Confusion often arises from the fact that the distinction is not always clearly expressed, although probably intended, between suspicious circumstances and a suspicious purchaser.

"Mere lack of notice is not sufficient; good faith implies honest intent. It is consistent with negligence, even gross negligence. A blundering fool may therefore be found to have acted in good faith, though under like circumstances a shrewd business man might be deemed to have acted in bad faith." Schintz v. American Trust & Sav. Bank, 152 Ill. App. 76.

The existence of suspicious circumstances does not necessarily spell bad faith. Negligence is not a synonym for bad faith, and failure to make inquiries does not compel a finding of bad faith; yet as the question is one of honesty and good faith it is competent to show these facts and it then becomes the province of the jury to say whether the person taking the instrument was guilty of bad faith. Everding v. Toft, 82 Ore. 1, 160 Pac. 1160, S. C. sec. 120-3.

In order to show that the defendant had "knowledge of such facts that his action in taking the instrument amounted to bad faith," it is not necessary to prove that the defendant knew the exact fraud that was practiced upon the plaintiff by the defendant's assignor, it being sufficient to show that the defendant had notice that there was something wrong about his assignor's acquisition of title, although he did not have notice of the particular wrong that was committed. Paika v. Perry, 225 Mass. 563, 114 N. E. 830.

It is sufficient that the buyer of a note had notice or knowledge that the note was in some way tainted with fraud. It is not necessary that he should know the particulars or even the nature of the fraud, since all that is required is knowledge of such facts that his action in taking the note amounted to bad faith. Ozark Motor Co. v. Horton (Mo. App.), 196 S. W. 395.

It is in harmony with the statute to charge that "the circumstances must be such as to show wilful neglect or such gross carelessness as fairly tend to the conclusion of bad faith. Farmers & Merchants Bk. v. Shaffer (Iowa), 147 N. W. 851. *Sed quaere?* "Wilful neglect" may possibly imply that the purchaser suspected and wilfully neglected to inquire. But "gross carelessness" alone should not be held to tend to the conclusion of bad faith.

The Supreme Court of Alabama seems to hold that although an indorsee takes without actual knowledge of defenses, yet if he has knowledge of facts which if pursued would have led to actual knowledge, he is chargeable with such knowledge. Elmore Co. Bank v. Avant, 189 Ala. 418, 66 So. 509, S. C. sec. 52. *Sed quaere,* as this seems to adopt the test of the reasonably prudent man and not that of actual good faith?

In Park v. Brandt, 20 Idaho, 660, 119 Pac. 877, it was held that a charge that "as matter of law wilful ignorance of facts is as much evidence of bad faith as actual knowledge of the same" was erroneous. A purchaser is not bound to investigate fully all the facts in relation to the execution of a note. The court, however, in this case and also in Park v. Johnson, 20 Idaho, 548, 119 Pac. 52, and in Vaughan v. Johnson, 20 Idaho, 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816, erroneously said that the purchaser is required to exercise such care as an ordinarily prudent man would under the circumstances. But the same court in Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302, said that though the purchaser "may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide,* his title according to settled doctrines will prevail."

In Burdell v. Nereson, 28 Idaho, 129, 152 Pac. 576, the court said that it had gone to the very limit, meaning, apparently, in favor of defendants in this class of cases (a stallion note fraud), in Winter v. Nobs, Vaughan v. Johnson, and Vaughan v. Brandt.

The knowledge afforded by mere indorsements of partial payments on a negotiable note as of the date of its issue do not make the purchase of the note "amount to bad faith." Bland v. Fidelity Trust Co. (Fla.), 71 So. 630, S. C. secs. 25, 124.

In an action by an indorsee against the maker it was held, that evidence that the plaintiff knew that there were charges of crookedness in business transactions against his transferor, was not competent. The N. I. L. was not cited. Setzer v. Deel, 135 N. C. 428, 47 S. E. 466. Such evidence is not of itself sufficient to put an otherwise *bona fide* purchaser on notice of fraud. Vaughan v. Brandt, 21 Idaho, 628, 123 Pac. 591.

On a check appeared the words, "Submitted with bid on H. S. D. Bldg.." and a suspicious explanation was given by the payee to the plaintiff indorsee. *Held,* that plaintiff was put upon inquiry as to payee's right to transfer the check. The N. I. L. was not cited on this point. Monk v. Twenty-Third Ward Bank, 165 N. Y. Supp. 1055. In view of the fact that such words on a check indicate that the delivery of the check is merely as security and returnable if the bid is not accepted, the indorsee may well be held to be put on notice. Public policy requires that even an innocent purchaser should be put on notice of matters appearing on the face of the instrument and of the meaning thereof,[1] although not of the extrinsic circumstances.

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[1] Jenkins v. Planters, etc., Bank, 34 Okl. 607, 126 Pac. 757.

Plaintiff paid only one-half its face for a note made payable at a place in Alaska, which was inaccessible for half the year. There was no evidence of lack of good faith. *Held,* no error to direct a judgment for plaintiff, although the maker had a good defense against the payee. McNamara v. Jose, 28 Wash. 461, 68 Pac. 903. See also, Lassas v. McCarty, 47 Ore. 474, 84 Pac. 76, S. C. sec. 57.

That notes made in one state are offered for sale in another is not a suspicious circumstance which puts a purchaser for value before maturity on inquiry. The N. I. L. was not cited. Bison State Bank v. Billington, 228 Fed. Rep. 116, 142 C. C. A. 522.

A purchase at a large discount does not alone constitute bad faith, though it might put the buyer on inquiry. Moore & Co. v. Burling, 93 Wash. 217, 160 Pac. 420, S. C. sec. 1-2.

The fact that plaintiff paid only $2,100 or $2,300 for a note for $2,500 does not raise a presumption of knowledge of an infirmity in the note. Miller v. Marks, 46 Utah, 257, 148 Pac. 412, S. C. secs. 54, 59.

Evidence that plaintiff paid $4,000 for a note for $5,000 is admissible on the question of good faith. Everding v. Toft, 82 Ore. 1, 160 Pac. 1160, S. C. sec. 120-3.

The fact that the plaintiff paid only $100 for a note for $300 is not of itself sufficient to prevent him from being a holder in due course, in the absence of evidence that he had knowledge of fraud in the procurement of the note. Ham v. Merritt, 150 Ky. 11, 149 S. W. 1131. Nor does the mere fact that the plaintiff who bought at a discount of twenty-five per cent. had bought many notes from the payee at the same discount. Pratt v. Rounds, 160 Ky. 358, 169 S. W. 848, S. C. secs. 124, 184.

Evidence that plaintiff bought a note made by responsible persons, when it had less than six weeks to run, for little more than one-half the face value, is enough to carry the question of plaintiff's *bona fides* to the jury. The N. I. L. was not cited on this point. Becker v. Hart, 135 App. Div. 785, 120 N. Y. Supp. 270.

The purchaser of a note secured by a mortgage is not put upon inquiry as to want of consideration from the fact that the property was not worth the face of the note, or that the note was indorsed by a trustee of the payee who had authority to indorse. Barker v. Sartori, 66 Wash. 260, 119 Pac. 611, S. C. sec. 1-2.

It is not within the apparent scope of the authority of the president and general manager of a corporation to pay an extraordinary rate of interest (130 per cent. per annum) for a loan, and the person with whom the contract is made is put upon inquiry. Stanley v. Franco-American Ferment Co., 97 Misc. Rep. 401, 161 N. Y. Supp. 365. It was also held in this case that the purchaser, from the payee, of demand notes, seven or more months after their date, for less than one-third the face, without inquiry, though he knew that the maker, of which he had been a director, had its place of business in the borough where he lived, is not a *bona fide* holder in due course. The cases cited by the court so far as they support this proposition go on the ground that the notes were

overdue. But the large discount is treated as evidence for the jury of bad faith.

Municipal bonds payable to bearer are negotiable instruments. The fact that the mayor of a municipality had signed, as mayor, negotiable municipal bonds, which he wrongfully appropriated and pledged to secure a loan to himself, is not sufficient to charge the pledgee, who had no knowledge of the pledgor's lack of authority, with notice of the pledgor's defect of title. Borough of Montvale v. People's Bank, 74 N. J. Law 464, 67 Atl. 67.

The fact that the maker presents to a bank for discount a note indorsed in blank by the payee does not constitute notice of wrongful possession by the maker. Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, 16, 124, 191.

In an action against the drawer, held, that the *bona fide* purchaser for value from the payee of a check is none the less a holder in due course because of the erasure of an indorsement of a subsequent party of which a plausible explanation was given at the time of plaintiff's purchase. Goetting v. Day, 87 N. Y. Supp. 510.

The loser of a check indorsed in blank by the payee can not recover from the drawee bank which paid it to a *bona fide* purchaser in due course, although previous to such payment the payee and the drawer gave notice of the loss to the bank and directed the bank not to pay it. Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655, S. C. sec. 9-5. See also Poess v. Twelfth Ward Bank, and Meuer v. Phoenix Nat. Bank, *infra,* sec. 187. *Cf.* Elliot v. Worcester Trust Co., *infra,* sec. 87; Pease & Dwyer v. State Nat. Bank, *infra,* sec. 189.

Taking a check indorsed in blank by the payee from a finder, who was unknown, but was supposed to be the payee, without inquiry as to his identity or further indorsement, does not prove knowledge of the defective title of the finder or bad faith. Unaka Nat. Bank v. Butler, *supra.*

Notice of an executory agreement between the maker and the payee of a note that the payee should do certain things, does not affect a purchaser who has no notice or knowledge that the payee has broken his contract. Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. sec. 29; McNight v. Parsons, 136 Iowa 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. secs. 52-3, 55; A. Marx & Sons v. Frey, 137 La. 948, 69 So. 757; Security Trust & etc., Co. v. Gleichman (Okla), 150 Pac. 908, S. C. sec. 2; Hakes v. Thayer, 165 Mich. 478, 131 N. W. 174; Moyses v. Bell, 62 Wash. 534, 114 Pac. 193, S. C. sec. 59; German American Bank v. Wright, 85 Wash 460, 148 Pac. 769, S. C. sec. 186; Piedmont Carolina Ry. Co. v. Shaw, 223 Fed. Rep. 973, 138 C. C. A. 227, S. C. sec. 93.

Plaintiff bought two notes, made by defendant, with notice that they were given upon a written contract of sale of a furnace to defendant by the payee, which gave the maker a year in which to test the sufficiency of the furnace. *Held,* that plaintiff took the notes, subject to the same infirmity which affected the payee, and that the fact that defendant paid one of the notes did not estop

defendant from setting up a breach of the stipulation discovered later. Eichberg v. Board of Education, 165 Ky. 814, 178 S. W. 1075. No authorities were cited, and the case seems wrong, since there was no provision in the contract cancelling the notes in case of the insufficiency of the furnace, in which respect the case differs from Sumter Co. State Bank v. Hays, 68 Fla. 473, 67 So. 109, in which case, a note was given on a subscription for shares in a company, to be thereafter organized within a certain time, and upon the agreement, that if the company was not organized within such time, the subscription was to be cancelled. These facts were known to plaintiff indorsee when he took the note. The condition was broken, and it was held that plaintiff could not recover against the maker.

Knowledge of a holder in due course that the note was given for a specified quantity of land at a specified price per acre, is not notice of failure of title or shortage of quantity. The N. I. L. was not cited. Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587.

A written agreement that the promissory note of a sales agent for the price of an automobile, given that he might remove the automobile from the county, might be discharged by the return of the automobile, is not strictly collateral to the note, but a part of the consideration and is not inadmissible as contradicting the note. The N. I. L. was not cited. Washington Trust Co. v. Keyes, 79 Wash. 61, 139 Pac. 638, Ann. Cas. 1916A, 279.

The indorsee of such a note is not a holder in due course, although he acquired it before the return of the automobile, where he not only had notice of the condition, but the agreement was made at his instance to protect his interest in the mortgage upon the automobile. *Ib.*

Promissory notes were given for the balance of purchase money of land sold by the payee to the maker. A written contract between the payee and maker provided that, "in consideration of the payments above mentioned, the vendor agrees to convey to purchaser in fee simple, free and clear of all encumbrances the following described real estate * * * all money paid under this contract to be returned if warranty deed and abstract are not furnished as herein provided." These notes were endorsed for value by the payee to a bank, which also took an assignment of the contract containing the foregoing clauses as security. The vendor was unable to make a good title and the maker refused to pay the notes. *Held*, that the bank could not, under the circumstances, be regarded as a *bona fide* purchaser without notice within the meaning of the law merchant or of the Negotiable Instruments Law. McNight v. Parsons, *supra*, p. 193, distinguished; Todd v. State Bank (Iowa), 165 N. W. 593.

A certificate of deposit payable to "A, trustee," or to "A, trustee of B," gives actual notice that it represents a trust fund, and an indorsee is bound to inquire as to the right of the trustee to dispose of it. Ford v. Brown, 114 Tenn. 467, 88 S. W. 1036.

Where a check given in payment of an individual debt, is signed by the debtor and another, as executors of an estate, the form of the check is notice to the payee that it is payable from trust funds. The collection of the check by the payee, makes him a joint tort feasor with the drawers. The N. I. L. was not cited. Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435.

The word "trustee" after the name of the payee, puts the purchaser upon notice as to the trustee's authority to sell and receive the proceeds. Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587. The N. I. L. was not cited. This court also said that the addition of the word "trustee" to the payee's name did not render the note non-negotiable, if the trustee had authority to sell. It is submitted that this is an incorrect statement and makes the negotiability of the note depend on something extrinsic thereto. Whether the trustee had power to sell bears not on the question of the passage of the legal title by indorsement, but upon the question of its passage subject to the trust.

A bank discounting a note payable to a guardian and placing the proceeds to his individual credit, and permitting him to check it out in payment of his individual debts, was held not a *bona fide* purchaser under the Ky. St. section 4707, empowering a guardian to sell personal property of his ward for investment, and was liable as a trustee of the fund. Taylor v. Harris' Admr., 164 Ky. 645, 176 S. W. 168.

A creditor paid by a guardian with a check signed by him as "special guardian," will be regarded as having constructive notice that the check was drawn on trust funds. Empire State Surety Co. v. Nelson, 141 App. Div. 850, 126 N. Y. Supp. 453.

A bank in which a guardian had deposited trust funds in his name, as guardian, was permitted to draw out the money on his individual checks. *Held*, that the bank was liable to a surety on the guardian's bond who paid the amount of the defalcation. The N. I. L. was not cited. U. S. Fidelity, etc., Co. v. U. S. Nat. Bank, 80 Ore. 361, 157 Pac. 155, L. R. A. 1916E, 610.

A check payable to and endorsed by one as guardian, was deposited in a bank to the individual deposit of the payee The payee gave a check to the bank to pay a note of his held by the bank. *Held*, that the bank was charged with notice of the rights of the ward, although it did not know who he was. Brovan v. Kyle (Wis.), 165 N. W. 383.

A check drawn upon a bank to the order of one as "attorney" is a negotiable instrument, and when such attorney deposits such a check to his individual account, the bank, having no notice of any trust, can apply the proceeds to the payment of such a person's antecedent debt to the bank. "Atty." may mean "assignee," "agent," or "attorney at law." When not coupled with other words of significance, the usual and proper meaning given to is "attorney at law." First Denton Nat. Bank v. Kenney, 116 Md. 124, 81 Atl. 227, Ann. Cas. 1913B, 1337.

The fact that a trustee deposits a check payable to him as trustee to his personal account, at a bank where he has no account as trustee, gives the bank no reason to believe that he is acting dishonestly, and the bank is not liable to the *cestui* though the trustee fails to account for the proceeds of the check. Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024; U. S. Fidelity & Co. v. Home Bank, 77 W. Va. 665, 88 S. E. 109; Miami County Bank v. State, 61 Ind. App. 360, 112 N. E. 40; Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059. See also Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; Allen v. Fourth Nat. Bank, 224 Mass. 239, 112 N. E. 650. The N. I. L. was not cited in the foregoing cases. Kendall v. Fidelity Trust Co. (Mass), 119 N. E. 861, citing secs. 52, 55, 56.

A bank, which received and credited to the account of a depositor a check payable to the treasurer of a town and indorsed by him as treasurer, is chargeable with notice that the check was the property of the town, and that the treasurer had no authority to indorse the check for circulation, but only for deposit and collection for the account of the town. The N. I. L. was not cited. Quincy Mut. Fire Ins. Co. v. International Trust Co., 217 Mass. 370, 104 N. E. 845, L. R. A. (N. S.) 1915B, 725, S. C. sec. 42.

A note forged by the treasurer of a town in the name of the town, as maker, was made payable at defendant bank, where the town had a deposit. The bank paid the note in good faith on the verbal order of the treasurer with the proceeds of a check by a third person, which was payable to the order of the town and indorsed by the treasurer to the bank. *Held*, that the bank, not being a purchaser of the note, was not put upon inquiry, and was not liable to the town. The N. I. L. was not cited. City of Newburyport v. First Nat. Bank, 216 Mass. 304, 103 N. E. 782.

Where a corporation has general authority to issue negotiable notes, a note issued by it for *ultra vires* purposes, *e. g.*, for purchase of stock in another corporation is not enforceable by the payee, but is good in the hands of a holder in due course. Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641, S. C. sec. 57.

The treasurer of plaintiff railroad company, authorized to sign checks, deposited to his own account in defendant bank checks drawn by him as treasurer of the railroad company to his own order, and later drew out the money. *Held*, that the drawee bank was the agent of the plaintiff to determine whether the checks were authorized and properly drawn, and having so decided and paid the checks, the plaintiff could not recover from the defendant, who acted in good faith. The case was distinguished from cases wherein the fraudulent officer was using trust funds to pay his individual debt to the defendant. The N. I. L. was not cited. Havana Central Railroad Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12, L. R. A. 1915B, 720, 27 Banking Law Journal 501. In Havana Central Railroad Co. v. Central Trust Co., 204 Fed. Rep. 546, 123 C. C. A. 72, L. R. A. 1915B, 715, the railroad com-

pany sued the drawee bank, to recover the amount of the checks involved in the foregoing case. The court refused to follow the New York Court of Appeals, and held, that a bank is not the agent of a corporate depositor, to pass upon the validity of such checks, but that the defendant was not liable because it was not charged with notice of misappropriation of funds by the fact, that the officer drew checks to his own order and indorsed them, if the bank did not know what use he made of them.

While a fiduciary may legally deposit the trust funds in a bank to his individual account and credit, yet where an executor deposits trust funds to his individual account by checks upon another bank and signed by him in the name of the estate, and afterwards paid from such deposits, consisting wholly of trust funds, a personal indebtedness to the bank of deposit, the depository is not only liable for the diversion of the money received by it, but is charged by law to take reasonable steps essential to keep it from thereafter paying to the executor as his own the trust funds. Havana Central R. R. Co. v. Knickerbocker Trust Co., *supra*, distinguished. The N. I. L. was not cited. Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759.

The treasurer of a corporation drew checks as treasurer payable to his own order, and indorsed them to his individual creditor in payment of a debt. *Held,* that this was not of itself enough to show bad faith on the part of the creditor, the court having found that the creditor took the checks in good faith. Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45.

But where a treasurer drew checks, as treasurer, payable directly to his creditor, the transaction showed on its face an appropriation of corporate money to pay the individual debt of the treasurer, and the transaction was bad, unless shown to be good, and the creditor's rights depended on whether the transaction was good, and the question of good faith did not arise. Johnson-Kittell Co. v. Longley Luncheon Co., 207 Mass. 52, 92 N. W. 1035.

The vice president of a corporation advanced to it $1,500 and subsequently took from it three notes for $833 each, payable to his own order and signed for the corporation by himself and the treasurer. These notes were indorsed to the plaintiff before maturity and paid for without inquiry by a check to the vice president individually. Subsequently two of the notes were paid by the corporation. *Held,* that the indorsee was put on inquiry by the form of the notes as to their consideration and could not recover on the third note, and the corporation was entitled to recover the excess of the amount paid over the amount advanced to it by the vice president. The N. I. L. was not cited. Neuman v. Neuman, 160 App. Div. 331, 145 N. Y. Supp. 325. Two judges dissenting.

The fact that the payee of a promissory note, made by a corporation, is a director of such corporation, is not notice to a transferee of any infirmity of the note, nor is it sufficient to put him upon inquiry concerning the circumstances under which the note is issued. The rule applicable to notes made by officers of a cor-

poration to their own order and used to pay their individual obligations, has no application to notes made by duly authorized officers payable to a director. Hence in an action against the corporation by the holder of such note, it is error to refuse to charge that the fact that the payee was a director threw no discredit on the note. Orr v. South Amboy Terra Cotta Co., 113 App. Div. 103, 98 N. Y. Supp. 1026.

Where a check of a corporation drawn by an officer is given in payment of the officer's debt, the creditor is put upon inquiry of the officer's authority to so use corporate funds. The N. I. L. was not cited. Reynolds v. Title Guaranty Trust Co. (Mo. App.), 189 S. W. 33.

A trust company took in part payment from a debtor a check on itself for more than $35,000, payable to its order, and signed by the treasurer of a company of which its debtor was president. Defendant knew that the capital stock of said company was $100,000, and that it had little or no surplus. *Held*, that the trust company was charged with notice of the lack of authority of the treasurer and president to make such use of the company's funds, and was liable for its amount. Lanning v. Trust Co. of America, 137 App. Div. 722, 122 N. Y. Supp. 485. The N. I. L. was not cited in this case.

The payee of a check of a corporation given by an employe for his individual debt to the payee is bound to inquire as to the employe's authority, and if he is not authorized to give the check, plaintiff can not recover against the corporation. Sheer v. Hall & Lyon Co., 36 R. I. 47, 88 Atl. 801.

Plaintiff receiving the check of a corporation payable to "the order of cash," signed by an officer in the presence of plaintiff in payment of a personal debt of the officer, is put upon inquiry as to the authority of the officer. Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216.

In St. Charles Savings Bank v. Edwards, 243 Mo. App. 553, 147 S. W. 978, the court said, in effect, that a delivery of a check by the drawer to the payee is not a negotiation. But this statement is contrary to the weight of authority and was unnecessary to the result. A cashier of a bank drew checks in the name of his bank on another bank to the order of E & Sons, brokers, and delivered them to the payees on account of the cashier's individual operations in stocks and grain. This may be a negotiation of the checks and yet the payees' knowledge of the fact that the cashier was using the funds of the bank for his own purposes made them guilty of bad faith. See notes to sections 14, 30 and 52.

One who takes in payment of a private debt the promissory note of a corporation, executed by the debtor as an officer of the corporation, does not take in the usual course of business and is charged with notice of any fraud or illegality in the execution of the note. Kipp v. Smith, 137 Wis. 234, 118 N. W. 484, *semble*.

Promissory notes signed, "The S. E. Co. by J. E. W. Prest." and payable to the "order of Jos. E. W. Co.," were negotiated to

the plaintiff by the indorsement of the Jos. E. W. Co. by W. J. W. Pres. and Treas., Jos. E. W. Sec'y." At the time of the execution of the note Jos. E. W. was not a member of or connected with the Jos. E. W. Co., but subsequently acquired an interest therein, having ceased to be president of the S. E. Co. *Held,* that while a transferee of commercial paper, made by an officer of a corporation to his own order and transferred in payment of his own debt, is put upon inquiry as to the authority of the officer, this rule does not apply when the paper is payable to a third person and indorsed by him, and that the plaintiff being a holder in due course could recover against the maker, the S. E. Co. Nat. City Bank v. Shelton Electric Co., 96 Wash. 74, 164 Pac. 933, S. C. sec. 11.

The treasurer of a city paid his individual debt by a check drawn by him, as treasurer, on the city's bank account and payable directly to the creditor. *Held,* that the treasurer had no authority and that the money could be recovered from the creditor by the city. Newburyport v. Fidelity Insurance Co., 197 Mass. 596, 84 N. E. 111.

So, also, where the treasurer of a city paid personal debts with checks bearing the name of the city printed thereon, signed by him as treasurer, payable to and indorsed by him in his individual capacity. *Held,* that the city can recover back the money from the indorsees in an action for money had and received. City of Newburyport v. Spear, 204 Mass. 146, 90 N. E. 522; City of Newburyport v. Fidelity Ins. Co., 197 Mass. 596, 84 N. E. 111, *accord.*

The treasurer of a town has no power to indorse a check payable to the order of the town except for deposit for collection to the account of the town. Therefore his indorsement of such a check to a third person, who deposited it in defendant bank, is notice to the bank of defect in the title of the depositor. Fillebrown v. Hayward, *supra,* p. 197, distinguished, because there the treasurer was treasurer of a private corporation. The N. I. L. was not cited. Franklin Sav. Bank v. International Trust Co., 215 Mass. 231, 102 N. E. 363.

A check, payable to the treasurer of a town, is in legal effect payable to the town, and every one dealing with the check is put on notice that the treasurer has no authority, by virtue of his office, to indorse such check for circulation. The N. I. L. was not cited. Quincy Mut. Fire Ins. Co. v. International Trust Co., 217 Mass. 370, 104 N. E. 845, L. R. A. (N. S.) 1915B, 725.

The president of the plaintiff corporation having the powers of a general manager, but not including the power to draw or indorse checks, converted checks drawn to the order of the plaintiff corporation by indorsing them with the name of the corporation by himself as president, and depositing them in the defendant bank to the credit of a firm of which he was a member, or to his individual credit. *Held,* that the defendant was put upon inquiry as to such president's authority and not having inquired, is liable to the plaintiff. The N. I. L. was not cited. Niagara Woolen Co.

v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890. Reviewed in 24 Harvard Law Rev. 496, and in 11 Columbia Law Rev. 428.

The president of a corporation, having no authority to do so, indorsed in payment of his individual debt to defendant a check made payable to the corporation. *Held,* that the form of the check was notice to defendant of a misuse of the corporation's property in apparent violation of the president's duty and that defendant was liable to the corporation for the proceeds of the check. Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585, S. C. sec. 25; Jenkins v. Planters, etc., Bank, 34 Okla. 607, 126 Pac. 757, not citing the N. I. L.

Plaintiffs, in renewal of a note made to them by a partnership, took a note of a third person to the order of a corporation, the treasurer of which was known to the plaintiffs to be a member of the partnership. *Held,* that the plaintiffs were put upon inquiry as to the authority of the treasurer to indorse the name of the corporation. Pelton v. Spider Lake Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963.

The president and treasurer of defendant corporation, without consideration, made notes in the corporate name to the order of the corporation, indorsed them in that name and also individually, and delivered them to the vice president for the accommodation of a firm of which all three persons were members. An agent of the firm offered them to plaintiff in another city for discount, representing that the notes were for the value given by the firm to the corporation, and plaintiff discounted the notes. *Held,* that neither the form of the notes and indorsement, nor the knowledge of plaintiff that the president and treasurer of the corporation were members of the firm, charged plaintiff with notice of the true character of the notes. *In re* Troy & Cohoes Shirt Co., 136 Fed. Rep. 420. *Cf.,* Nat. Bank v. Snyder Co., *supra,* sec. 29.

A bank bought a note from the payee, a manufacturing company. The president of the bank was a director of the company. The company took the note on an agreement with the maker that it should be renewed until the goods for which it was given were sold. The president of the bank had been asked if the bank would discount notes for the company, if taken for goods sold to responsible parties, but it did not appear that he had any knowledge of the agreement as to renewal, and such knowledge could not fairly be inferred from the surrounding circumstances. *Held,* that a finding that the bank had no notice of the infirmity in the note was not erroneous. First Nat. Bank v. Fairfield Auto Co. (Conn.), 99 Atl. 577.

Where the form of the indorsement by the vice president and general manager, of a check payable to a corporation, was such as to put the indorsee upon inquiry, he will be chargeable with notice only of such defects as a reasonable inquiry would have disclosed. The N. I. L. was not cited. Fensterer v. Pressure Lighting Co., 85 Misc. Rep. 621, 149 N. Y. Supp. 49.

Although the deposit by the manager of a partnership to his private account of a check to the partnership is enough to put the bank on inquiry as to his authority to do so, yet, where such inquiry, though not made, would have disclosed an apparent authority in the manager to appropriate the proceeds of the check to his own use, the partnership can not recover from the bank the amount of the check so paid. The N. I. L. was not cited. Buckley v. Lincoln Co., 72 Misc. Rep. 218, 131 N. Y. Supp. 105.

The president of a bank drew his personal check on the bank and gave it to his creditor in payment of a note. *Held*, that the creditor is not thereby charged with notice that the deposit account of the president was overdrawn. The N. I. L. was not cited. Pope v. Ramsay Co. State Bank (Minn.), 162 N. W. 1051.

Sec. 57. Rights of Holder in Due Course.

A holder in due course holds the instrument free from any defect of title of prior parties, and free from [1] defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof [2] against all parties liable thereon.

The Illinois Act after the word "themselves" interpolates a clause excepting the defenses of fraud and circumvention and gaming, which are, by statutes referred to in said clause, made real defenses.

Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; Johnson County Savings Bank v. Walker, 82 Conn. 24, 72 Atl. 579; Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, S. C. sec. 14; Rice v. Barrington, 75 N. J. Law 806, 70 Atl. 169; Ketcham v. Govin, 35 Misc. Rep. 375, 71 N. Y. Supp. 991, S. C. sec. 56; Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N. Y. Supp. 922; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; Albany Co. Bank v. People's Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773, S. C. sec. 54; Benedict v. Kress, 97 App. Div. 65, 89 N. Y Supp 607; German-American Bank v Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Rosenthal v. Freedman, 53 Misc Rep. 595, 103 N. Y. Supp. 714; Gansevoort Bank v. Gilday, 53 Misc. Rep. 107, 104 N. Y. Supp. 271, S. C. sec. 25; Siegmeister v. Lispenard Co.,

[1] The English Act reads "from mere personal defenses." B. E. A. s. 38 (2).

[2] The words "for the full amount thereof" are omitted in the English Act. B. E. A. s. 38 (2).

107 N. Y. Supp. 158; Klar v. Kostiuk, 65 Misc. Rep. 199, 119 N. Y. Supp. 683, S. C. secs. 55, 66; Nat. Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63, S. C. sec. 52; Unaka Nat Bank v. Butler, 113 Tenn. 574, 83 S. W. 655, S. C. secs. 9-5, 56; Moore & Co. v. Burling, 93 Wash. 217, 160 Pac. 420, S. C. secs. 1-2, 56; Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479, S. C. sec. 55; *In re* Troy & Cohoes Shirt Co., 136 Fed. Rep. 420, S. C. secs. 29, 56.

Under the Illinois amendment it has been held, that the holder in due course of a note executed without consideration by a foreign corporation doing business in the state, without having complied with the statutes, can recover against the corporation, although the payee could not. This is not a case of fraud or circumvention in the execution of the note. Weir & Craig Co. v. Bonus, 177 Ill. App. 626.

The Wisconsin Act adds the words "except as provided in sections 1944 and 1945, of the statutes relating to insurance premiums and also in cases where the title of the person negotiating such instrument is void under the provisions of section 1676-25 (N. I. L. section 55) of this Act." (See Aukland v. Arnold, *supra,* section 55.) *Held,* that the above-quoted exception does not include a note given for lightning rods which did not contain a statement that it was so given, as required by Laws 1903, chap. 438, and that a holder in due course could recover on such a note. The statute did not declare that such a note should be void, but imposed a penalty for failure to comply with its terms. Arnd v. Sjoblom, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842.

The holder of a note may sue both the maker and indorser or either. The indorser when sued may plead as a set-off the indebtedness of the holder to him. The N. I. L. was not cited. Curtis v Davidson, 215 N. Y. 395, 109 N. E. 481, S. C. secs. 66, 84.

This section changes the law of Tennessee and under it a holder in due course may recover the full amount of the instrument, not merely the amount paid for it. Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641, S. C. sec. 56.

The purchase of a negotiable promissory note at a heavy discount (two-thirds of the face value) is not of itself enough to prevent the buyer from being a holder in due course and recovering the full amount. Lassas v. McCarty, 47 Ore. 474, 84 Pac. 76. See also, McNamara v. Jose, 28 Wash. 461, 68 Pac. 903, S. C. sec. 56, and other cases under section 56.

The fact that a bank, which is a holder in due course of a check, obtained by the payee by fraud, sues the drawer alone and not the payee-indorser is not evidence that the bank is no longer the holder, but is suing for the benefit of the indorser. Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279.

Plaintiff may recover against the drawer of a check given to the payee for salary and which the plaintiff cashed for one to whom it had been indorsed by the payee for a gambling consideration,

plaintiff having no notice of such illegality. The N. I. L. was not cited. Poshkoff v. Bernstein, 95 Misc. Rep. 140, 159 N. Y. Supp. 207.

The payee of a check, fraudulently obtained from the drawer, indorsed and deposited it in plaintiff's bank. The amount was entered as a credit in the payee's bank book but not on the books of the bank, and the payee at once drew out by check a part of the amount. It was the usual course of plaintiff bank upon receiving a large check on another bank in the same city to send the check for certification and this was done within fifteen minutes, but the drawee bank refused to honor the check. The plaintiff bank sued the drawer for the amount it had paid on the check to the payee who had absconded. *Held*, that a finding of the trial court that the plaintiff was not a purchaser in the usual course of business in good faith, that it did not acquire the title to the check and could not recover, was sustained by this evidence. Southwestern Nat. Bank v. House, 172 Mo. App. 197, 157 S. W. 809.

It is submitted that the plaintiff had a lien on the check for the amount drawn out by the payee (N. I. L., section 27) and to that extent should have been allowed to recover and that the decision is in conflict with Jefferson Bank v. Merchants Refrigerating Co., 236 Mo. 407, 139 S. W. 545.

Under N. Y. Laws 1837, c. 430, sec. 1, all usurious securities are void. The National Banking Act provides that a national bank knowingly charging a usurious rate on a loan or discount shall forfeit all interest, but does not make the instrument void. N. Y. Laws 1900, chap. 310, places state and private banks on a parity with national banks as to usury. A state bank *bona fide* in due course and for value discounted a note which was void for usury as between the original parties. *Held*, that the bank can recover on the note. Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619. But if the bank had knowledge that the note was usurious as between the original parties, it can not recover, Laws 1900, chap. 310, having no application in such a case. Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626.

The defendant, desiring to raise money, executed a note to the order of her agent for $2,100, and delivered it to him with directions to sell it. He procured the defendant to indorse it and sold it to the plaintiff for $1,850. *Held*, that the usury laws have not been repealed by the Negotiable Instruments Law and that the transaction constituted a usurious loan which avoided the note even in the hands of a holder in due course. Sabine v. Paine, 166 App. Div. 9, 151 N. Y. Supp. 735, affirmed, 223 N. Y. 401, 119 N. E. 849, S. C. secs. 29, 55, 66; *contra*, Emanuel v. Misicke, 149 N. Y. Supp. 905; Kennedy v. Heyman, 167 N. Y. Supp. 311, S. C. secs. 29, 55.

Sec. 58. When Subject to Original Defenses.

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.[1] But a holder[2] who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

The Illinois and Wisconsin Acts insert "duress" after "fraud" and substitute "such holder" for "the latter."

In Alabama and North Dakota the section was originally adopted without change, but in Alabama in the Compilation of 1907 the words "has all the rights of such latter" were substituted for the rest of the paragraph after the word "instrument" in the second paragraph. But by the Act of 1909, which corrected a number of errors in the Compilation, the language of the original section was restored. In North Dakota the Compilation of 1913 substituted the word "holder" for "latter" at the end of the section.

Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, S. C. sec. 52; Fairfield Co. Nat. Bank v. Hammer, 89 Conn. 592, 95 Atl. 31, S. C. sec. 124; Bryan v. Harr, 21 App. D. C. 190; Craig v. Palo Alto Stock Farm, 16 Idaho, 701, 102 Pac. 393, S. C. secs. 51, 191; Fullerton Lumber Co. v. Snouffer, 139 Iowa, 176, 177 N. W. 50, S. C. sec. 119; Underwood v. Fosha, 96 Kan. 240, 150 Pac. 571; the court cited section 65, but section 58 was evidently intended; Austin v. First Nat. Bank, 150 Ky. 113, 150 S. W. 8; Black v. First Nat. Bank of Westminster, 96 Md. 399, 54 Atl. 88, S. C. secs. 29, 56; Symonds v. Riley, 188 Mass. 470, 74 N. E. 926; Miller v. People's Sav. Bank (Mo. App.), 186 S. W. 547; State v. Greenville Bank (Mo. App.), 187 S. W. 597, S. C. sec. 52; Groh's Sons v. Schneider, 34 Misc. Rep. 195, 68 N. Y. Supp. 862, S. C. sec. 52; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; Jennings v. Carlucci, 87 N. Y. Supp. 475; Emerson-Brantingham Co. v. Brennan, 35 N. D. 94, 159 N. W. 710.

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[1] Not in B. E. A.

[2] The English Act inserts here "(whether for value or not)." B. E. A. s. 29 (3).

A purchaser from a holder in due course is entitled to recover against the maker, even though he have notice of fraud. McMurray v. McMurray, 285 Mo. 405, 167 S. W. 513.

A note given for a grain drill with a warranty was transferred to plaintiff after maturity. *Held,* that a breach of the warranty need not be set up as a counterclaim under the statute respecting assignments, but is properly pleaded as a defense under this section. American Seeding Co v. Slocum, 58 Misc. Rep. 458, 108 N. Y. Supp. 1042.

Only defenses existing at the time of its transfer affect a promissory note, although it was not indorsed by the payee. Therefore, where a note was given for advances to be made subsequently, failure of the payee to make the advances will not prevent recovery by the assignee. Marling v. Fitzgerald, 138 Wis. 93, 120 N. W. 388, S. C. secs. 25, 49. See note criticising this case, *supra,* sec. 49

A statute declared that contracts where money is knowingly lent to be used in wagering shall be void. *Held,* that a note given to a bank for money which the maker used in stock gambling was not void, where the bank did not know that fact. Also, the note being valid in the hands of the payee, an accommodation indorser may enforce it, although he had notice of the purpose for which the money was to be used. The N. I. L. was not cited. Citizens' Nat. Bank v. McDannald, 116 Va. 834, 83 S. E. 389.

Plaintiff took, as collateral for a note made by X, a note made by defendant to the order of X and indorsed by X. Subsequently, the note made by X was surrendered and the plaintiff became the absolute owner of the note made by defendant. *Held,* that plaintiff, having become a holder in due course when he took defendant's note as collateral, did not cease to be such when it took the note absolutely, although in the meantime plaintiff had received notice of an equity in favor of the maker against the payee. The N. I. L. was not cited on this point. City Nat. Bank v. Kelly (Okla.), 151 Pac. 1172.

An indorsee of a note, who took it with notice of a separate written agreement between the maker and the payee to renew the note at maturity is bound by such agreement. Farmers & Traders Bank v. Laird, 188 Mo. App. 322, 175 S. W. 116.

Where, contrary to an agreement upon which defendant signed a note for accommodation, that the accommodated maker should discount it at a bank for cash, the maker negotiated it after maturity for corporate stock, the defendant was not liable to the transferee. Schlamp v. Manewel (Mo. App.), 190 S. W. 658, S. C. sec. 29.

The defendant gave his promissory notes to a corporation on account for work done with the understanding that if on investigation the cost of the work proved excessive, due to the negligence of the corporation, an allowance was to be made on the notes for the excess cost. The corporation discounted the notes before maturity with the plaintiff. The plaintiff was financially interested in the corporation and its president and other officers were mem-

bers of the corporation's finance committee and in that capacity had notice of the condition on which the notes were given. *Held,* that the plaintiff is not a holder in due course and can only recover the value of the notes less deductions due to excessive cost. Title Guaranty & Trust Co. v. Pam, 155 N. Y. Supp. 333, S. C. sec. 59.

The payee of a negotiable note indorsed it, without recourse, and also made a written assignment of the note and the mortgage securing it, to the plaintiff. *Held,* that as plaintiff took the note with full knowledge that it was a mortgage note, collectible by him only as such, under section 6861 Revised Codes, which permits but one action for the recovery of debt or the enforcement of any right secured by mortgage, which action must be in accordance with the provisions of the chapter on actions for the foreclosure of mortgages, the note came into his hands as a non-negotiable instrument subject to equities in favor of the maker. Bukler v. Loftres, 53 Mont. 546, 165 Pac. 601.

G purchased an undivided one-fifth of land, which was held as security for a note under a deed of trust, assuming and agreeing to pay one-fifth of the note. Subsequently G purchased the note, which was indorsed by the payee to the plaintiff, G's wife, as a gift to her from her husband. A third person subsequently bought four-fifths of the land and paid four-fifths of the amount of the note to G, but did not get the note. *Held,* that the plaintiff can not recover from the makers on the note. Greer v. Orchards, 175 Mo. App. 494, 161 S. W. 875. It is submitted that the decision is erroneous, at all events, as to four-fifths of the amount of the note. For there was no equity existing against the note at the time the plaintiff took it. If the payee or other holder of a note indorses it as a gift to another and there is no equity against the donor, the donee will not be affected by equities subsequently arising, such as payment, between the maker and the donor. Milne v. Dawson, 5 Exch. 948; First Nat. Bk. v. Wood, 128 N. Y. 35, 27 N. E. 1020. And this case is even stronger in favor of the plaintiff, because the note was never held by the husband but was indorsed directly to the wife by the payee, against whom there was no equity. If it had been shown that the wife really held the note and was suing as agent for her husband, the case would be different, but this was not done.

The definitions in section 191 apply only in case the context of any particular portion of the law does not otherwise require. Sections 49, 58 and 191 "holder" taken together show that a transferee from a holder in due course, although without indorsement, is included within the word "holder" in section 58, who is entitled to rely on the title of his transferor under section 58. Smith v. Nelson Land & Cattle Co., 212 Fed. Rep. 56, 128 C. C. A. 512, S. C. secs. 4-2, 25, 184, 191. *Cf.,* Mayers v. McRimmon and other cases, *supra,* sec. 49, p. 155.

A payee whose title is defective can not better it by selling the instrument to a holder in due course and buying it back again.

Andrews v. Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870; Hoye v. Kalashian, 22 R. I. 101, 46 Atl. 271; Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623.

Nor can one recover on a note, who, as agent for a payee with a defective title, buys the note from a holder in due course. Miller v. Chinn (Mo. App.), 195 S. W. 552; Battersee v. Calkins, 128 Mich. 569, 87 N. W. 760.

One who receives a promissory note from the maker in part payment of a debt due from the maker can not establish that he is "a holder in due course" by showing that said note had, prior to the time he received it, been held by other "holders in due course." When the note found its way back into the hands of the maker, such former holdings "in due course" lost their force and effect, even though the maker did reissue the note. The N. I. L. was not cited on this point. Builders Lime & Cement Co. v. Weimer, 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174, S. C. secs. 14, 125.

The payee of a promissory note negotiated it to G in fraud of his written contract with the maker. G was a party to the fraud and he negotiated it to a holder in due course. At maturity the note was dishonored, and the holder sold the note to the plaintiff, who was found to be acting as G's agent. *Held*, that the burden was on the plaintiff to show that he was a holder in due course and that under the circumstances, a finding that he was not, is justified. Berenson v. Conant, 214 Mass. 127, 101 N. E. 60.

A note, made or indorsed by defendants for the accommodation of a third person, was delivered to an agent to be negotiated and the proceeds paid to such third person. The agent sold the note to a *bona fide* purchaser but appropriated the proceeds to his own use. At maturity the note was protested for non-payment, and the agent paid it and afterwards sold it to the plaintiff, who had notice of the dishonor and agreed with the agent to extend the time. *Held*, that the agent having fraudulently sold the note could not acquire a good title by payment to or purchase from the *bona fide* purchaser and could not give a good title to plaintiff. Comstock v. Buckley, 141 Wis. 228, 124 N. W. 414, S. C. secs. 29, 119.

In Horan v. Mason, 141 App. Div. 89, 125 N. Y. Supp. 668, the court construed the words "and who is not himself a party to any fraud or illegality affecting the instrument" as applicable only to a payee and not to a holder who took with notice of fraud or illegality and who thereafter transferred the instrument to a holder in due course and subsequently reacquired it from such holder in due course. The court stated that such was the common law. It is submitted that this statement is erroneous.[1] An amendment to section 58 had been suggested in order to make certain that a purchaser with notice should not be able to cure a defect

[1] Brannan, Some Necessary Amendments to the Negotiable Instruments Law, 26 Harvard Law Rev. 493, 503, n. 35, citing cases.

in his title by the procedure above described.[2] It is argued, however,[3] that a party taking with notice, although not the payee, becomes a party to the fraud or illegality by taking it with notice, and still more so, when he transfers it, and that, therefore, he can not recover on the instrument upon re-acquiring from a holder in due course. And this position seems to be supported by the two cases last above cited.

It is also to be noted that under section 121, which seems to have been overlooked by the New York court, if such purchaser with notice, upon transferring the instrument, indorses it and then pays it, he is remitted to his former rights as regards all prior parties. But section 121 would not affect a party who reacquires an instrument after a transfer by indorsement without recourse or by delivery of an instrument payable to bearer.

The plaintiff, the Phoenix Bank, took for value but after maturity, a note which the defendant maker claimed to have paid to the payee. Plaintiff claimed that his transferor, the Olive Hill National Bank, had taken the note before maturity and that the plaintiff took the rights of his transferor. But the court said, citing section 58, that "the Phoenix Bank having taken the note after it became due, although from one to whom it had been indorsed before maturity, occupies no better position than if it had taken the note at the time it did from the payee," and that a transferee from a prior transferee occupies no safer position than does a transferee from the original payee." Bank of Willard v. Pennsylvania, etc., Brick Co. (Ky.), 194 S. W. 110. Of course, this is erroneous, for it has long been the common law that one who takes from a holder in due course takes the rights of such holder in due course, except in the case of a transfer to a party to any fraud or illegality affecting the instrument, as provided in section 58. And sections 58 and 59 of the Negotiable Instruments Law confirm the right of a holder, though not of himself entitled to be regarded as a holder in due course, to rely upon the rights of a holder in due course through whom he claims title. He gets at least the title of his transferor and, if this is not defective, neither is that of the purchaser after maturity.

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[2] "Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, or had not previously been a holder with notice and subject to the defense of such fraud or illegality, has all the rights of such holder in due course in respect of all parties liable to the latter except intervening indorsers." Brannan, Some Necessary Amendments to the Negotiable Instruments Law, 26 Harvard Law Rev. 493, 502. The words "except intervening indorsers" at the end of the proposed amendment should, however, be omitted, as that matter seems to be taken care of by the last paragraph of section 50.

[3] Greeley, The Uniform Negotiable Instruments Law, 10 Ill. L. Rev. 265, 271.

Plaintiff was a holder in due course. He sold the note and afterwards re-acquired it, at which time he had knowledge of infirmities therein. *Held*, that this did not impair his original position as a holder in due course. The N. I. L. was not cited on this point. Ratcliffe v. Costello, 117 Va. 563, 85 S .E. 469.

A note, which was subject to an equity in favor of the defendant maker against the payee, was indorsed by the payee in blank and negotiated to a holder in due course, taken up by the payee at maturity and transferred without further indorsement to plaintiff, who paid value without notice of the equity. *Held*, that plaintiff could not recover. The N. I. L. was not cited. Steinberger v. Hittelman, 93 Misc. Rep. 105, 156 N. Y. Supp. 320. The decision is correct on the ground that the transfer was after maturity and by the payee, whose re-acquisition of the note cut off the right of any subsequent transferee to rely simply on the title of the holder in due course. When an instrument gets back into the hands of a prior party, whose title was defective, it takes a fresh start and if transferred by him after maturity or to one with notice or without value, the transferee's rights are not greater than his transferor's. Booher v. Allen, 153 Mo. 613, 55 S. W. 238; Weil v. Carswell, 119 Ga. 873, 47 S. E. 217. But the reason given by the court, namely, that the note had not been again indorsed by the payee, seems wrong. The delivery of the note with the old blank indorsement thereon was the adoption of that indorsement and equivalent to a new indorsement. Hawkins v. Shields, 100 Miss. 739, 57 So. 4.

A transferee of a check, even if he did not take it in good faith for value, may recover from the drawer the amount thereof, less any sums due the drawer because of equities existing between the drawer and the payee. The N. I. L. was not cited. Lazarowitz v. Stafford, 167 N. Y. Supp. 910.

Sec. 59. Who Deemed Holder in Due Course.

Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course.[1](*a*) But the last-mentioned rule does not apply in favor of a party who

[1] "But if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." B. E. A. s. 30 (2).

became bound on the instrument prior to the acquisition of such defective title.[2](*b*)

Bruce v. Citizens Nat. Bk., 185 Ala. 221, 64 So. 82; Sample v. Tennessee Valley Bank (Ala.), 76 So. 936; Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132, S. C. sec. 52; Harris v. Johnson, 89 Conn. 128, 93 Atl. 126; Fairfield Co. Nat. Bank v. Hammer, 89 Conn. 592, 95 Atl. 31, S. C. sec. 124; Bryan v. Harr, 21 App. D. C. 190; Tucker v. Fouts (Fla.), 76 So. 130; Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302, S. C. sec. 56; Brown v. Miller, 22 Idaho, 307, 125 Pac. 981, S. C. sec. 52; Altschul v. Rogers, 22 Idaho, 512, 126 Pac. 1048; First Nat. Bank v. Hall (Idaho), 169 Pac. 936; City National Bank v. Mason (Iowa), 165 N. W. 103; Scovel v. Monaghan (Iowa), 164 N. W. 783; Hawkins v. Young, 127 Iowa, 281, 114 N. W. 1041; Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805; Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, S. C. sec. 14; McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265, S. C. secs. 52-3, 56; City Nat. Bank v. Jordan, 139 Iowa, 499, 117 N. W. 758; Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237, S. C. secs. 4, 56; Stotts v. Fairfield, 163 Iowa, 726, 145 N. W. 61; Merchants' Nat. Bank v. Grigsby, 170 Iowa, 675, 149 N. W. 626; Houge v. St. Paul Fire, etc., Ins. Co., 174 Iowa, 607, 156 N. W. 863; Abmeyer v. First Nat. Bank, 76 Kan. 877, 92 Pac. 1109; Ireland v. Store, 91 Kan. 326, 137 Pac. 926; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, S. C. secs. 25, 52-2; Christina v. Cuseniano, 129 La. 873, 57 So. 157; Arnd v. Heckert, 108 Md. 300, 70 Atl. 416; Regester's Sons Co. v. Reed, 185 Mass. 226, 70 N. E. 53; Feigenspan v. McDowell, 201 Mass. 341, 87 N. E. 624; Peoples State Bank v. Miller, 185 Mich. 565, 152 N. W. 257, S. C. secs. 52, 55; Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643, S. C. secs. 3-2, 25, 55; Farmers' & Merchants' Bank v. Numson (Mo. App.), 177 S. W. 778; Bank of Ozark v. Hanks, 142 Mo. App. 110, 125 S. W. 221; Ostenberg v. Kanka, 95 Neb. 314, 145 N. W. 713; Lucker v. Iba, 54 App. Div. 566, 66 N. Y. Supp. 1019; Karsch v. Pottier Co., 82 App. Div. 230, 81 N. Y. Supp. 782; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, S. C. secs. 66, 124; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Consolidation Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353, S. C sec. 52-3; Colborn v. Arbecam, 54 Misc. Rep. 623, 104 N. Y. Supp. 986; Engle v. Hyman, 54 Misc. Rep. 251, 104 N. Y. Supp. 390; Packard v. Figliuolo, 114 N. Y. Supp. 753; Peterson v. Alton, 162 App. Div. 21, 147 N. Y. Supp. 280, S. C. sec. 55; Zwerdling v. Kitrosser, 148 N. Y. Supp. 99; Ecks v. Montanara, 152 N. Y. Supp. 1010; Hartford Nat. Bank v. Gard-

[2] The provision in the last sentence is omitted in the English Act. B. E. A. s. 30 (2).

ner, 157 N. Y. Supp. 849; Finkelstein v. Fine (App. Div.), 169 N. Y. Supp. 772; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, S. C. sec. 31, 49; First Nat. Bank v. Griffin 153 N. C. 72, 68 S. E. 919; Myers v. Petty, 153 N. C. 462, 69 S. E. 417; Fidelity Trust Co. v. Ellen, 163 N. C. 45, 79 S. C. 263; Third Nat. Bk. of St. Louis v. Exum, 163 N. C. 199, 79 S. E. 498, S. C. sec. 51; Fidelity Trust Co. v. Ellen, 163 N. C. 45, 79 S. E. 263, 148 N. C. 590, 156 N. C. 309, 162 N. C. 63; Merchants Nat. Bank v. Braeson, 165 N. C. 344, 81 S. E. 410; First Nat. Bank v. Warsaw Drug Co., 166 N. C. 99, 81 S. E. 993; Smathers v. Toxaway Hotel Co., 167 N. C. 474, 84 S. E. 47; Raleigh Banking & Trust Co. v. Clark (N. C.), 90 S. E. 200; Wilson v. Lewis, 170 N. C. 47, 86 S. E. 804; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, S. C. sec. 55; Tamlyn v. Peterson, 15 N. Dak. 488, 107 N. W. 1081; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Kerr v. Anderson, 16 N. D 36, 111 N. W. 614; Grebe v. Swords, 28 N. D. 330, 149 N. W. 126; Thompson v. Citizens Nat. Bank of Adams, 32 Ohio C. C. 131; Sink v. Ellen, 79 Ore. 78, 154 Pac. 415. N. I. L. was not cited. Bank of Morehead v. Hernig, 220 Pa. 224, 69 Atl. 679; Cook v. Am. Tubing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; Barnard v. Tidrick, 35 S. D. 403, 152 N. W. 690, not citing the N. I. L. Warren v. Smith, 35 Utah, 455, 100 Pac. 1069; Hawes v. First Nat. Bk. of Piedmont, 113 Va. 588, 75 S. E. 127; Ireland v. Scharpenberg, 54 Wash. 558, 103 Pac. 801; Cedar Rapids Nat. Bank v. Myhre Bros., 57 Wash. 596, 107 Pac. 518; City Nat. Bk. of Lafayette v. Mason, 58 Wash. 492, 108 Pac. 1071; Gottstein v. Simmons, 59 Wash. 178, 109 Pac. 596; Pelton v. Spider Lake Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963, S. C. sec. 56; Hodge v. Smith, 139 Wis. 326, 110 N. W. 192, S. C. secs. 16, 52-3, 55; Holdsworth v. Blyth & Fargo Co., 23 Wyo. 52, 146 Pac. 603, S. C. sec. 55; *In re* Troy & Cohoes Shirt Co., 136 Fed. Rep. 420, S. C. sec. 56; *In re* Hill, 187 Fed. 214.

(*a*) This section is declaratory of the common law. The Negotiable Instrument Act is in the main a codification of the common law rules. Where it lays down a new rule it controls; but where its language is consistent with the rule previously recognized, it should be construed as simply declaratory of the law as it was before the adoption of the act. Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114, S. C. sec. 25.

This section applies to an accommodation note obtained from the accommodating party by fraudulent representations of the payee. Kennedy v. Spilka, 72 Misc. Rep. 89, 129 N. Y. Supp. 390.

The presumption that the holder of a note is a holder in due course, is not rebutted by a denial in the answer of the ownership of the plaintiff. Gulf States Steel Co. v. Ford (N. C.), 91 S. E. 844.

After an instruction that the holder of a check is *prima facie* a holder in due course, it is error to add "that is, if he takes it in good faith for value without notice of infirmity and is the owner

thereof, and entitled to sue thereon," because this deprives the plaintiff of the benefit of the presumption that he is a *bona fide* holder. Standard Trust Co. v. Commercial Nat. Bank, 167 N. C. 260, 83 S. E. 474.

Where the maker pleads failure of consideration, the purchaser should reply that he is a *bona fide* purchaser. Section 59 has not changed this rule of pleading. Tatum v. Commercial Bank & Trust Co., 185 Ala. 249, 64 So. 561, S. C. sec. 28. It is submitted that this is an incorrect rule of pleading. The defendant should be obliged to plead not only his defence, but facts showing that the plaintiff was not a holder in due course. See *infra*, p. 217.

In Stannard v. Orleans Flour Co., 93 Neb. 389, 140 N. W. 636, it was held, not citing the N. I. L., that where there is no allegation in the pleadings that plaintiff is an innocent purchaser, and purchased the note without notice of an equity against his transferor, and there is no evidence tending to support such a contention, the plaintiff's claim must be considered as if owned and held by his transferor. This holding is, of course, erroneous both at common law and under the statute which clothes the holder with the presumption that he is a holder in due course, so that it is not incumbent upon him to so allege. It is only when there is an allegation and proof of an equity, that plaintiff is put upon proof that he paid value *bona fide* and without notice.

On a plea of *nil debit* by the maker, and a plea that plaintiff was not "a holder for value in due course and before maturity of note," it is sufficient for a *prima facie* case for plaintiff, to give evidence of the making of the note and the indorsement. Holdsworth v. Anderson Drug Co. (W. Va.), 87 S. E. 565.

In an action on a note, plaintiff testified that he received the note from an indorser before maturity, and paid an adequate consideration and rested. Defendant offered evidence to show an illegal consideration, viz: that the note was originally delivered as a secret preference. This evidence was rejected. *Held*, that this was error. Bass v. Goldstein, 83 Misc. Rep. 412, 145 N. Y. Supp. 38.

A transferee, whose title has been attacked, may testify whether he acted fraudulently or in bad faith. Smathers v. Toxaway Hotel Co., 167 N. C. 468, S. C. sec. 56.

It is not necessary for plaintiff to show the title of all prior holders. It is sufficient to show either that plaintiff or any other former owner was a holder in due course. A. E. McBee Co. v. Shoemaker, 174 App. Div. 291, 160 N. Y. Supp. 251.

In an action by an indorsee against the maker, where defendant admits that the note was made for a valuable consideration, but denies, on information and belief, the indorsements, it was sufficient for the plaintiff to introduce the note in evidence with the indorsements thereon. Beck v. Maller, 131 App. Div. 243, 115 N. Y. Supp. 596.

A payee who obtains a note, without fraud or duress or other unlawful means, in consideration of an agreement to furnish something in the future to the maker, and who negotiates it before the

time fixed for the performance of the agreement, without being guilty of fraud, has not a defective title, and the burden is not on the indorsee or one claiming under him to show that they are holders in due course, although the second indorsee acquired it after maturity, and with notice of the payee's failure to perform his contract. Moyses v. Bell, 62 Wash. 534, 114 Pac. 193, S. C. sec. 56.

The negotiation of a note by the payee, to prevent a defense of a breach of warranty upon the sale of a horse for which the note was given, is a fraudulent negotiation and places on the indorsee the burden of proving that he is a holder in due course. Bank of Bushnell v. Buck Bros., 161 Iowa, 362, 142 N. W. 1004; *Cf.*, Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 77 S. E. 1006, S. C. sec. 52-3.

The burden put upon the plaintiff involves something more than the mere presumption arising from an indorsement regular in form. O'Connor v. Kleiman, 143 Iowa, 435, 121 N. W. 1088.

When defendant has proved fraud, the further inquiry is not whether defendant has shown that plaintiff took with notice of the fraud, but whether plaintiff has shown that he took in good faith and without notice. Cox v. Cline, 139 Iowa, 128, 117 N. W. 48.

Proof that plaintiff gave value before maturity is not enough to show good faith. Natl. Bank v. Foley, 54 Misc. Rep. 126, 103 N. Y. Supp. 553, S. C. secs. 25, 52-3. But see Hodge v. Smith, *supra*, sec. 52-3, *contra*.

In an action on a note the maker gave evidence of duress. *Semble* that it was also incumbent on defendant to show that plaintiff indorsee was not an innocent purchaser of the note. Callendar Savings Bank v. Loos, 142 Iowa, 1, 120 N. W. 317.

The court did not refer to and evidently overlooked section 59 N. I. L. See Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805, and other Iowa cases.

Where a note was transferred before maturity, through several indorsements, to the plaintiff, who paid the face value thereof, and the defendant admitted the execution of the note, but pleaded that the note was procured through fraud, but no evidence was offered that the plaintiff had any knowledge of the fraud, it is error to direct a verdict for the defendant. The N. I. L. was not cited. Barbieri v. Casazza, 115 N. Y. Supp. 1074.

But see Gottstein v. Simmons, 59 Wash. 178, 109 Pac. 596, holding that if the defendant has given evidence enough to satisfy the jury as to fraud and failure of consideration, and plaintiff offers no evidence of good faith, defendant is entitled to a verdict.

The trial court erroneously put on the maker the burden of proving that plaintiff was not a holder in due course. Nevertheless, a judgment for plaintiff will not be set aside if the undisputed evidence affirmatively shows that plaintiff is a holder in due course. Miller v. Marks, 46 Utah, 257, 148 Pac. 412, S. C. secs. 54, 56.

Where the maker did not deny the allegations of the complaint that the payee, before maturity, indorsed, assigned and delivered

the note to plaintiff for value, an allegation, coupled with a defense of failure of consideration, denying that plaintiff was an innocent purchaser for value, raises no issue, because the fact intended to be disputed was already admitted by the failure to traverse the allegations of the complaint. Brown v. Feldwert, 46 Ore. 363, 80 Pac. 414.

Defendant having given evidence of fraud, and plaintiff having responded by showing that he acquired the note *bona fide* for value in the usual course of business and before its maturity, it was error to charge that the *prima facie* case of plaintiff was restored, because such instruction assumed the truth of plaintiff's evidence and withdrew the question from the jury. American Nat. Bank v. Fountain, 148 N. C. 590, 62 S. E. 738.

When fraud has been shown, the burden is on the plaintiff affirmatively to establish good faith. Whether he has done so is for the jury, and a verdict should not be directed for plaintiff, unless the testimony is not only consistent with good faith, but is such that there is no room for difference of opinion among fair-minded men. Arnd v. Aylesworth, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638, S. C. sec. 56. But an uncontradicted denial of notice of fraud by the purchaser may be sufficient, when taken with the circumstances to justify direction of a verdict. Robertson v. Stock Co., 164 Iowa, 230, 145 N. W. 535.

Where plaintiff has the burden of proving that he is a holder in due course, he is not entitled to a verdict as a matter of law, even though the testimony of his witnesses warrants such a finding. The jury was not bound to believe their testimony, although uncontradicted. Phillips v. Eldridge, 221 Mass. 103, 108 N. E. 909.

Although the jury is the judge of the evidence, yet where there was no conflict in the evidence as to plaintiff's good faith, and nothing to indicate that the witness for plaintiff was testifying falsely, a verdict for defendant was set aside. Southwest Nat. Bank v. Lindsley, 29 Idaho, 343, 158 Pac. 1082.

Where the plaintiff was the only witness as to his being a holder in due course, and his testimony is of such character that reasonable men might differ upon the issue, it is not error to deny a motion to direct a verdict for plaintiff and a motion for judgment, notwithstanding the verdict. The N. I. L. was not cited. Rohweder v. Titus, 85 Wash. 441, 148 Pac. 583.

Although the burden is on the plaintiff to show that he was a holder in due course, the question may be withdrawn from the jury and determined as a matter of law when the evidence is clear and convincing, and of such nature that reasonable minds can draw but one conclusion therefrom. McLaughlin v. Dopps, 84 Wash. 422, 147 Pac. 6.

In an action by plaintiff bank against an indorser, who claimed that the note was procured from him by the fraud of the maker, the only witness as to the *bona fides* of the bank was its cashier. It was held error not to permit the case to go to the jury to pass on the credibility of the cashier, although his testimony had not

been contradicted. Second Nat. Bk. v. Hoffman, 229 Pa. 429, 78 Atl. 1002. But after the second trial of the same case it was held that when it was shown by the testimony of the cashier, by that of the maker called as a witness and by the admission of the defendant, that the bank had no knowledge of the fraud, it was error to submit the question of the bank's knowledge to the jury. Second Nat. Bk. v. Hoffman, 233 Pa. 390, 82 Atl. 463.

Plaintiff paid to defendant a note to which plaintiff's signature as maker was forged, mistaking it for a genuine note of like amount which he had made. Plaintiff sued defendant to recover back the money and was non-suited. *Held,* error, that the rule is the same as in the case of a payment by the drawee of a bill to which the name of the drawer is forged, and that plaintiff could not recover if defendant was a holder in due course. But the burden upon this point was on the defendant under sections 55-59, N. I. L., and the question should therefore have been submitted to the jury. Jones v. Miners' & Merchants' Bank, 144 Mo. App. 428, 128 S. W. 829.

The defense of fraud must be both pleaded and proved. It can not be proved under a bare allegation of no consideration. German-American Bank v. Barnes, (Mo. App.), 185 S. W. 1194, S. C. sec. 23.

An instruction to the jury that assumes that the burden rests on the plaintiff to prove himself a holder in due course, is erroneous, unless qualified by instruction that such burden is not imposed on the plaintiff until the defendant has shown that the note was negotiated in fraud of him. Crosby v. Reynolds, 196 Fed. Rep. 640, 116 C. C. A. 314.

The burden of proving equitable defenses is, as against a transferee of a negotiable note, on the defendant. Steele v. Ingraham, 175 Iowa, 653, 155 N. W. 294.

Where there was no fraud in the inception of a note and no evidence that it was fraudulently put in circulation the holder is under no obligation to show that he is a holder in due course. The N. I. L. was not cited. Biggs v. Carter (Iowa), 161 N. W. 322.

When plaintiff has produced a negotiable instrument and proved the indorsement and there is no evidence of defect of title in the person who negotiated the instrument plaintiff is not required to prove that he paid value before maturity in good faith and without notice of any defect. Moon v. Simpson, 170 N. C. 335, 87 S. E. 118.

The defendant is not entitled to judgment in his favor if he has not offered evidence tending to establish the allegations of his answer setting up fraud, want of consideration or other defect in the instrument, even though the jury may have found that the plaintiff, who held the note, was not a purchaser for value after notice and before maturity. Raleigh Banking & Trust Co. v. Clark, (N. C.), 90 S. E. 200.

Where the title of the payer is not shown to be defective within section 55, the burden of overthrowing the *prima facie* presumption that the indorsee is a holder in due course, is on the defendant. Commercial Security Co. v. Jack, 29 N. D. 67, 150 N. W. 460.

The burden of proof to establish that he is a holder in due course rests upon the plaintiff at all times, but when he has put in the note and proved that he gave value for it he establishes a *prima facie* case and the burden of going forward with the evidence shifts to the defendant. But, when the defendant proves a defect in the title of the payee, the burden of going forward against shifts to the plaintiff to proove that he took the notes before maturity in good faith without notice of the defect. The N. I. L. was not cited on this point. Title Guarantee & Trust Co. v. Pam, 155 N. Y. Supp. 333, 339 S. C. sec. 58.

Where the evidence establishes that the title of the party negotiating the instrument was defective, the holder claiming to be a purchaser in good faith for value and without notice must make this claim good by the greater weight of evidence. Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 185; American Nat. Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Louis de Jonge & Co. v. Woodport Hotel Co., 77 N. J. 233, 72 Atl. 439; Schultheis v. Sellers, 223 Pa. 506, 72 Atl. 887.

But in First Nat. Bank v. Brown, 160 N. C. 23, 75 S. E. 1086, the court although citing American Nat. Bank v. Fountain and Singer Mfg. Co. v. Summers, *supra,* said (probably inadvertently) that the burden was upon the defendant to show, not only infirmity in the paper, but also knowledge on the part of the plaintiff, at the time the note was discounted, of such facts as would make a case of bad faith on his part.

The statute upon proof of fraud etc., casts on the holder, not merely the duty of going forward, but the burden of establishing that he or some one under whom he claims, acquired the title as a holder in due course. The burden of proof remains on the holder and does not shift, though the burden of proceeding may shift, even though the defendant introduces no evidence to contradict the plaintiff, since on this point the defendant is entitled to have the case submitted to a jury. Leavitt v. Thurston, 38 Utah, 351, 113 Pac. 77, S. C. sec. 38. Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588, S. C. 164 Mo. App. 195, 147 S. W. 1114.

But see Eisenberg v. Lefkovitz, 142 App. Div. 569, 127 N. Y. Supp. 595, in which case the plaintiff indorsee testified that he bought the note of the payee for value before maturity and rested. The defendant introduced evidence of the fraud, but no evidence affecting the plaintiff with notice of *mala fides.* The court thereupon struck out the evidence and directed a verdict for the plaintiff. *Held,* no error, two judges dissenting. It is submitted that the dissenting opinion is more correct under section 59.

Where the plaintiff shows that he took the instrument in good faith and for value and without notice of any infirmity in the

instrument or defect in the title of his transferor and the defendant failed to show the contrary it was proper peremptorily to instruct the jury to find for the plaintiff. Asbury v. Taube, 151 Ky. 142, 151 S. W. 372, S. C. sec. 53.

Whether the phrase "burden of proof" has been used by the courts in the sense of the burden of establishing an issue or of the duty of going forward with the evidence is often left in doubt. The courts often fail to make this distinction, which is most fully and clearly explained by Professor James B. Thayer.[1] As a matter of principle, since the holder of a negotiable instrument is presumed to be a holder in due course, it is incumbent on the defendant who does not deny the execution of the instrument, to plead the fraud, or illegality, or other matter which would make the title of the plaintiff's transferor defective. But this is not enough. The defendant by the better rule adopted in England, and in a number of the states is obliged also to plead something to charge the conscience of the plaintiff and make it inequitable for him to insist upon his legal right, such as, that the plaintiff took with notice or without value or after maturity.[2] Then upon issue taken upon this plea, the burden is on the defendant, but if he give evidence to prove his special defense of fraud or illegality or the like, it has always been held that "the burden of proof then shifts to the plaintiff." The reason given is, sometimes, that the party whose title was defective, would be likely to put the instrument into the hands of an agent to sue upon it, and that it would be fair to require the plaintiff to show he was not sueing for the fraudulent party.[3] Sometimes the reason given, is that the facts as to the plaintiff's giving of value, having no notice and taking before maturity in good faith, are so peculiarly within the knowledge of the plaintiff that it is right to require him first to give evidence upon these points.[4] After the plaintiff has done this, it is said that the burden of proof shifts to the defendant to meet the plaintiff's evidence upon these points. But, when the evidence is all in, the question arises upon whom is the burden of establishing? As to the special defence of fraud or illegality, it is conceded that the burden of establishing is upon the defendant. But, as to the question of the plaintiff being a holder in due course, there was a conflict of authority. The pleading would, of course, put the burden of establishing upon the defendant, whose duty it was, as above stated, to allege the facts necessary to charge the conscience of the plaintiff. Many courts, failing to dissect the meaning of the phrase burden of proof into its component parts, burden of establishing and duty of going forward with the evidence, have held that the burden of proof upon all the issues was upon the plaintiff, although this was

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1 Thayer, A Preliminary Treatise on the Law of Evidence, 353-389.

2 Ames, Cases on Pleading, 2d ed. 342, n. 2.

3 Bailey v. Bidwell, 3 M. & W. 73; Fitch v. Jones, 5 E. & B. 238, 245, 246, and other cases cited in Ames Cases on Pleading, 2d. ed. 342, n. 2.

4 Atlas Bank v. Holm, 71 Fed. Rep. 489, 19 C. C. A. 94.

contrary to the correct rule of pleading. The words "burden of proof," are used in section 59 without any indication of the sense in which they are to be taken, but the cases above cited, show that the courts have construed the words in this section as putting upon the plaintiff, not merely the duty of going forward with the evidence after the defendant has given evidence upon his defense, but also the burden of establishing the facts necessary to make the plaintiff a holder in due course.

In German American National Bank v. Lewis, 9 Ala. App. 352, 63 So. 741, S. C. secs. 30, 52, the court adhered to the former Alabama rule to the effect that after the defendant had given evidence of his defense, and the plaintiff had proved that he paid value before maturity in the ordinary course of trade, the burden shifted to the defendant to prove that the plaintiff had notice of the facts constituting the defense, and said that section 59 had made no change in this rule. The case was cited with approval in Miller v. Johnson, 189 Ala. 354, 357, in which case, however, it does not clearly appear when the instrument was made. And the same rule was laid down in Elmore Co. Bank v. Avant, 189 Ala. 418, 66 So. 509, S. C. sec. 56, without referring to section 59. A charge to the same effect was approved in Hudson v. Repton State Bank (Ala. App), 75 So. 695, but not citing the N. I. L. These Alabama cases are, of course, contrary to the provisions of section 59 as interpreted in the cases above cited.

In the federal court, whether sitting in bankruptcy or administering the law of the state on the ground of adverse citizenship, the burden of proving notice or bad faith on the part of plaintiff, is on the defendant, the matter of presumption and burden of proof belonging to the law of evidence. Young v. Lowry, 192 Fed. Rep. 825, 113 C. C. A. 149; Washington, etc., Ry. Co. v. Murray, 211 Fed. Rep. 440, 128 C. C. A. 112.

If notes sued on by an indorsee are tainted with fraud in their inception even though this affected the consideration, the burden of proof was upon the plaintiff to show that he gave value. City Deposit Bank v. Green, 138 Iowa, 156, 115 N. W. 893.

But, while the burden of proof to show that he or some one under whom he claims is a holder in due course, is shifted to the holder when the fraudulent character or negotiation of the paper is shown, the presumption that the indorsee is a *bona fide* holder for value is not repelled merely by proof that the instrument as between the immediate parties was without consideration. Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. Supp. 1043, *semble;* Joveshof v. Rockey, 58 Misc. Rep. 559, 109 N. Y. Supp. 818, S. C. sec. 24; Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 77 S. E. 1006; Douglass v. Burton (Neb.), 154 N. W. 718. As to the rule where the action is between immediate parties, see cases cited *supra*, sec. 24.

The burden of proof that he is a holder in due course, is not put on the plaintiff, by proof of total or partial failure of consideration. The terms of section 55, which defines defective titles, do not include want or failure of consideration. Bank of Polk v. Wood, 189 Mo. App. 117, 173 S. W. 1093; Hill v. Dillon, 176 Mo. App. 192, 161

S. W. 881; Bank of Polk v. Wood, 189 Mo. App. 62, 173 S. W. 1093; Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 Pac. 411; Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792, *semble*. The holding in Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548, S. C. sec. 52-3, and in Johnson Co. Savings Bank v. Mills, 143 Mo. App. 265, 127 S. W. 425, that section 59 has made a change in this respect, is overruled by the later Missouri cases above cited.

In an action by the maker to procure the cancellation of a promissory note, after evidence of a fraudulent negotiation by the payee has been introduced, the burden is upon the defendant to show that he is a holder in due course. Peterson v. Alton, 162 App. Div. 21, 147 N. Y. Supp. 280.

ENGLAND—

When fraud has been proved, the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud. Tatam v. Haslar, 23 Q. B. D. 345; Oakley v. Boulton, 5 T. L. R. 60; Harris v. Aldous, 18 New Zealand L. R. 449.

This section does not affect the practice of the Chancery Division, which requires the amount of the bill to be paid into court or security to be given upon an application for an injunction to restrain the negotiation of a bill alleged to have been obtained by fraud. Hawkins v. Ward, W. N. [1890] 203.

It has been held in Talbot v. Van Boris [1911], 1 K. B. 854, that the effect of the last clause of section 30(2) of the Bills of Exchange Act (*supra*, p. 209, n. 1), "unless and until the holder proves that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill," is to confine the operation of the section to holders other than the payee, and therefore the burden is not on the payee to show that he did not have knowledge of duress proved to have been practiced by a husband upon his wife to induce her to sign the note sued on.

The language of section 59 of the Negotiable Instruments Law is quite different from the English section, but under section 59 the same result seems to be reached, although for different reasons. The section does not purport to shift the burden of proof when the payee's title is defective. It is only when it is "shown that the title of any person who has negotiated the instrument is defective" that the burden of proof shifts to the holder. But it is a rare case in which the person who negotiates the instrument to the payee is other than the party making the instrument and of course his title to his own obligation can not be defective.

(*b*) In Parsons v. Utica Cement Co., 80 Conn. 58, 66 Atl. 1024, the court appears to have overlooked the last paragraph of section 59 and held that where the plaintiff acquired the instrument from a prior holder, who had obtained it fraudulently and without consideration from the rightful owner, the burden was on the plaintiff to prove that he was a holder in due course, although defendant the maker, had no defense of its own to the instrument. The last

clause of section 59 was intended to codify the contrary case of Kinney v. Kruse, 28 Wis. 183. See Crawford Negotiable Instruments Law, 3d Ed. 79 n. (c), 4th Ed. 117.

After the second trial of Parsons v. Utica Cement Co., 82 Conn. 333, 73 Atl. 785, the court discovered that the instrument had been made and delivered prior to the taking effect of the Negotiable Instruments Law, and deciding the case according to the pre-existing law, the court declined to follow Kinney v. Kruse, saying that it is opposed to the strong current of authority. *Sed quaere* unless the rightful owner has notified the maker not to pay. See Prouty v. Roberts, 6 Cush. 19; Carrier v. Sears, 4 Allen, 336; Merchants Exch. Bank v. N. B. Savings Institution, 33 N. J. L. 170; Brown v. Penfield, 36 N. Y. 473; Houghton v. McAuliffe, 26 How. Pr. 270.

In Kinney v. Kruse, A, who held possession of a note for the payee, fraudulently transferred it. This was held to be no defense in a suit by the holder against the maker and not to change the burden of proof so as to require the plaintiff to show that he was a *bona fide* holder for value. The fraud in putting the note in circulation which will operate as a defense or change the burden of proof, must be a fraud against the defendant. The Supreme Court of Connecticut, while holding that this case is opposed to the strong current of authority, cited no cases except Fulton Bank v. Phenix Bank, 1 Hall (Superior Court of New York) 562, which case, in turn, cited no authority upon the point except an earlier case of Talman v. Gibson in the same volume p. 308. In this case, no cases were cited on the point except Solomons v. Bank of England, 13 East, 135, and Rees v. Marquis of Headfort, 2 Campbell, 574. In the first of these cases it appeared that the defrauded owner of the instrument had given notice to the maker not to pay, and in the second case, which was an action against the acceptor of a bill of exchange, it appeared that the drawer, called as a witness, testified that he had been tricked out of the bill by fraud, whereupon it was held that the plaintiff was bound to prove what consideration he gave. The truth is, that this question is rather one of substantive law than of the burden of proof, that is, whether a defendant, who has no defense of his own, can set up collateral equities existing in favor of other persons. It is submitted that, by the great weight of authority, he can not do so, unless he has been notified by the rightful owner of the instrument not to pay the same to the holder. This exception, even, is an exercise of equitable jurisdiction by a court of law. The proper remedy for the defendant in such a case is either to file a bill of interpleader, bringing in the third party, who claims an equity, or where the procedure in the jurisdiction permits it, to make such third person a party to the action at law. If notice has been given by the defrauded owner of an instrument not to pay, the court of law may well permit the rights of such defrauded owner to be set up by the defendant by analogy to a case of bailment. A bailee is ordinarily estopped to dispute the title of his bailor and to set up the right of a third person, but where a person,

claiming to be the owner of the property, serves notice on the bailee, he may defend an action by the bailor, it being held that in such case the defendant may set up the *jus tertii* in answer to the action. "The bailee can set up the title of another only if he defends upon the right and title and by the authority of that person." Biddell v. Bond, 6 B. & S. 225.

Section 59, it is submitted, does not present a satisfactory way of dealing with the question. The first part of the section requires that when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to show that he or some person under whom he claims, acquired the title as a holder in due course, which included, under section 52-4, the requirement that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. From this the inference seems necessary that, if he had notice, even of an equity in favor of a former holder, he could not recover against any party to the instrument—a result, it is submitted, contrary to the authorities. In order to prevent this result the last clause of section 59 was inserted, but it is insufficient for the purpose, since it implies that, if the defendant successfully sustains the burden of showing that the plaintiff is not a holder in due course, the action must fail, whether the equity against his ownership is in favor of the defendant or of a third person. The question is one of substantive law and not merely of rules of evidence and it is to be regretted that a section regulating the burden of proof should be so drawn as to involve this question in uncertainty.

The case of Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, is *contra* to the case of Parsons v. Utica Cement Co. and regards the last clause of section 59 as intended to settle the conflict of authority on this question.

Voss v. Chamberlain, however, seems wrong on the facts. A note payable to A, B and C or order was indorsed in blank and left among the private papers of A in a bank. C abstracted the note and pledged it to a *bona fide* purchaser for his own debt, but later got it back fraudulently and returned it to the papers of A. All of these proceedings were unknown to A and B. The *bona fide* purchaser sued A and B for conversion of the note and recovered on the ground that defendants not having paid anything upon the return of the note, were not holders for value in due course. But the equities were equal and the defendants had the legal title and therefore ought to prevail. Moreover, the return of the note and its acceptance by defendants was a discharge of C's obligation to return it, and this should be a sufficient consideration to make the defendants purchasers for value. London & Co. Banking Co. v. London & River Plate Bk., L. R. 21 Q. B. D. 535;[1] Nash v. DeFreville, 15 T. L. R. 264. The reversal of the judgment in the

[1] See comment of Professor Ames, The Doctrine of Price v. Neal, 4 Harvard Law Rev. 275, 309.

last-mentioned case [1] can be sustained, if at all, only on the ground that the defendant was negligent in paying his note without requiring its return, and that his equity was therefore not equal to that of the plaintiff.

ARTICLE V.

LIABILITIES OF PARTIES.

Sec. 60. Liability of Maker.

The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.[2]

Under this section and section 24, the plaintiff upon proving defendant's signature to the note is entitled to a verdict, and the burden of proving a defense of fraud is on the defendant. Harvey v. Squire, 217 Mass. 411, 105 N. E. 355.

Where the payee purports to be a corporation, in an action against the maker, proof of its incorporation is irrelevant. Grover v. Muralt, 23 N. D. 576, 137 N. W. 830.

Defendant made a note payable to "The Ingle System Co." In that name plaintiff sued defendant on the note but gave no proof to show that it was a corporation. *Held*, that defendant was estopped to deny the corporate existence of the payee. The N. I. L. was not cited. Ingle System Co. v. Norris, 132 Tenn. 472, 178 S. W. 1113.

Where the statute does not declare the instrument void, a holder in due course can recover against the maker on a promissory note made to the order of a foreign corporation, although it had not complied with the statutory conditions to the right to do business in the state. McMann v. Walker, 31 Colo. 261, 72 Pac. 1055; Citizens' Nat. Bank v. Bucheit (Ala. App.), 71 So. 82, S. C. secs. 3, 25; Jones v. Martin (Ala. App.), 74 So. 761; Commercial Bank v. Jordan, 71 Fla. 566, 71 So. 760; First Nat. Bank v. Utterback (Ky.), 197 S. W. 534; Neyens v. Worthington, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142; Finseth v.

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1 [1900], 2 Q. B. 72.

2 "The maker of a promissory note by making it (1) Engages that he will pay it according to its tenor; (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." B. E. A. s. 88.

Scherer (Minn.), 165 N. W. 124; Young v. Gaus, 134 Mo. App. 166, 113 S. W. 735; Halsey v. Henry Jewett Co., 190 N. Y. 231, 83 N. E. 25, *semble;* Edwards v. Hambly Fruit Products Co., 133 Tenn. 142, 180 S. W. 163. See also, Nat. Bank of Commerce v. Pick, *supra,* sec. 52. *Secus* if the statute declares the contract void. Jones v. Martin, *supra.* See also, cases under section 55.

The fact that the payee of a note was a partnership doing business in violation of a law requiring it to file certain certificates is no defense as against a holder in due course. The N. I. L. was not cited. Pontiac Sav. Bank v. Reinforced Concrete Pipe Co., 178 Mich. 261, 144 N. W. 486.

In Whitehead v. Coker (Ala. App.), 76 So. 484, although the statute did not expressly declare the contract void out of which the note arose, it was held that such was the necessary implication of the statute. The N. I. L. was not cited. *Sed quaere?* The statutes prescribed a penalty for practicing medicine without a license and provided that a physician should not be entitled to compensation for services where his certificate had not been recorded. A note given to a physician for services in violation of these provisions was held void even in the hands of a holder in due course. See Blethenthal v. City of Columbia, 175 Ala. 398, 402, 57 So. 814, 815, *semble, contra.*

In Williams v. Turnhill (Okla.), 162 Pac. 770, the court quoted from an Iowa case that "where an act is absolutely prohibited by statute, or is contrary to public policy, all notes, etc., given in furtherance of that act are null and void." This language is too broad, but as in the case before it, the holder, an indorsee, was not an innocent purchaser, the result was correct. The N. I. L. was not cited.

Sec. 61. Liability of Drawer.

The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse;[1] and engages that on due presentment the instrument will be accepted or[2] paid, or both,[3] according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express

[1] "Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." B. E. A. s. 55 (1) (b).

[2] The English Act reads "and" instead of "or." B. E. A. s. 55 (1) (a).

[3] The words "or both" are omitted in B. E. A. s. 55 (1) (a).

stipulation negativing or limiting his own liability to the holder.

The Colorado and Illinois Acts omit the word "subsequent" before "indorser." The District of Columbia, North Dakota and New York Acts read "accepted and paid."

The plaintiff drew a bill of exchange in favor of the defendants on a corporation which accepted it. Subsequently the defendants indorsed the bill for value before maturity to the plaintiff. The bill was not paid at maturity and was protested and due notice given to the defendants. *Held*, that the defendants are not liable to the plaintiff on their indorsement, no special or collateral agreement to that effect having been alleged or shown. U. S. Rail Co. v. Wiener, 169 App. Div. 561, 155 N. Y. Supp. 425.

Where a check is given for a valuable consideration, the drawer is the principal debtor, and in the event of no funds in the bank to pay the check, he becomes absolutely liable. And this obligation survives the death of the drawer. The N. I. L. was not cited. Baxter v. Brandenburg (Minn.), 163 N. W. 516, S. C. sec. 25.

The giving of a check is a representation that the drawer has money or credit with the bank and is sufficient to make the drawer guilty of obtaining money under false pretenses if the drawer has no money in the bank or credit with it and intends to defraud. State v. Hammelsy, 52 Ore. 156, 96 Pac. 865, 17 L. R. A. (N. S.) 244.

Sec. 62. Liability of Acceptor.

The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits,—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and
2. The existence of the payee and his then capacity to indorse.[1]

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1 "The acceptor of a bill, by accepting it, (1) Engages that he will pay it according to the tenor of his acceptance; (2) Is precluded from denying to a holder in due course; (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement." B. E. A. s. 54.

The Missouri Act omits "then" before "capacity" in subsection 2.

AMES: Since an acceptor, by section 62, engages to pay the bill "according to the tenor of his acceptance," he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European States.[1]

This interpretation of the section seems to be approved by the Supreme Court of Oklahoma in Cherokee Nat. Bank v. Union Trust Co., 33 Okla. 342, 347, 125 Pac. 464, S. C. sec. 66.

But in McLendon v. Bank of Advance, 188 Mo. App. 417, 174 S. W. 203, the court citing section 62, followed the rule in Price v. Neal as to checks to which the drawers' names were forged, but as to genuine checks in which the amounts had been raised, after issue, the court followed the American cases before the act and held that a bank, which had paid a raised check, was not prevented by section 62 from recovering back the money from the holder. This leaves untouched the question whether an acceptor of a raised, but otherwise genuine instrument, is liable thereon. It is difficult to see how he can escape liability if any meaning is to be given to the words "engages that he will pay according to the tenor of his acceptance." The tenor of the acceptance is determined by the terms of the bill as it is when the drawee accepts and that is a bill for the raised amount. That is the bill he accepted and no other, and according to its tenor he has engaged that he will pay it.

Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. secs. 49, 187; Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187; Anglo-South American Bank v. Nat. City Bank, 161 App. Div. 268, 146 N. Y. Supp. 457, S. C. secs. 23, 189.

Defendant bank, without negligence, cashed a forged check on plaintiff bank, indorsed it, "Indorsement guaranteed. Pay any national or state bank or order," and sent it for collection and it

[1] 4 Harvard Law Rev. 306, 307.

was paid by plaintiff, who, upon discovery of the forgery, sued to recover the money. *Held,* that plaintiff could not recover; that section 62 was intended to adopt the doctrine of Price v. Neal, 3 Burrow, 1354, and applied as well to a payment as to an acceptance by the drawee of a forged bill or check. Also, that the indorsement of the defendant bank was not a guaranty to the drawee but only to indorsees. National Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513; National Bank of Commerce v. Mechanics' Am. Nat. Bank, 148 Mo. App. 1, 127 S. W. 429, accord; Missouri Lincoln Trust Co. v. Third Nat. Bank, 154 Mo. App. 89, (*semble*); State Bank v. First Nat. Bank, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (N. S.) 100; National Bank of Commerce v. Farmers, etc., Bank, 87 Neb. 841, 128 N. W. 522, S. C. sec. 30; State Nat. Bank v. Bank of Magdalena, 21 N. M. 653, 157 Pac. 498; Bergstrom v. Ritz-Carlton Co., 171 App. Div. 776, 157 N. Y. Supp. 959; State Bank v. Cumberland Savings, etc., Co., 168 N. C. 605, 85 S. E. 5, not citing the N. I. L.; Cherokee Nat. Bank v. Union Trust Company, 33 Okla 342, 125 Pac. 464; First Nat. Bank v. Bank of Cottage Grove, 59 Ore. 388, 117 Pac. 293; Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817, not citing section 62; Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117, S. C. secs. 14, 66.

Some unknown person forged a check on plaintiff bank and paid the same to the city to discharge a street assessment on defendants' land, which defendants subsequently sold. The plaintiff bank having paid the check and charged the account of its depositor, upon discovery of the forgery, credited the sum back to the depositor and sued defendants for the amount. *Held,* that section 62, N. I. L., has no application in behalf of one who has acquired the paper without consideration. That the plaintiff was entitled to be subrogated to the lien of the city as against the proceeds of the sale of the land in the hands of defendants, if it should appear upon a new trial that the payment of the assessments were purely gratuitous and not in discharge of a real or supposed obligation on the part of the depositor or the unknown forger. Title Guarantee & Trust Co. v. Haven, 196 N. Y. 487, 89 N. E. 1082.

After the second trial of this case the Court of Appeals, reversing the Appellate Division,[1] held, on the evidence, that the payment of the assessments by the forger, whose identity had been discovered, was gratuitous and not in discharge of an obligation by him or the depositor, and that the plaintiff was therefore entitled to have the lien of the assessment reinstated and to be subrogated thereto. Title Guarantee & Trust Co. v. Haven, 214 N. Y. 468, 108 N. E. 819.[2]

The Secretary of the Treasury is bound to know the signatures of those officers of the United States who are authorized to draw

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[1] 154 App. Div. 652, 139 N. Y. Supp. 207.

[2] See this case as reported in the Appellate Division, reviewed in 22 Harvard Law Rev. 141 and 26 Harvard Law Rev. 634.

on him; and hence, having paid a draft purporting to have been drawn by the American consul in Argentine, but in fact bearing the consul's forged signature, the United States could not recover the money so paid, whether the draft was negotiable or not. United States v. Bank of New York, 219 Fed. Rep. 648, 134 C. C. A. 579, L. R. A. 1915D, 797.

A clerk in the office of an officer in the Quartermaster's Department, who was authorized to draw on the Treasurer of the United States, drew a draft on the Treasurer, payable to the name of the officer, forged the name of the officer as drawer and as indorser, cashed the draft in a bank which indorsed it to defendant, to whom it was paid on presentation to the Treasurer. The United States sued defendant to recover back the money. *Held,* citing Price v. Neal, 3 Burr. 1354, but not the N. I. L. on this point, that plaintiff could not recover. United States v. Chase Nat. Bank, 241 Fed. Rep. 535. The case is reviewed in 31 Harvard Law Rev. 304.

A clerk in the New York office of a telegraph company obtained blank forms of drafts, such as were issued by its agents to persons to whom money is transferred by telegraph, forged the signature of an agent of the company in Petersburg, Va., made the draft payable to a fictitious payee, forged his indorsement, and deposited the drafts in his own bank, by which they were forwarded to the telegraph company, which paid them, and upon discovery of the forgery sued the bank to recover the money. *Held,* that the plaintiff could not recover. The only question which was raised or discussed was as to whether the circumstances under which the bank received the deposits were so suspicious as to put the bank upon inquiry. The question involved in Price v. Neal was not discussed, nor was section 62 cited. It was apparently taken for granted that if the bank was a *bona fide* purchaser it could retain the money. Postal Telegraph-Cable Co. v. Citizens' Nat. Bank, 228 Fed. Rep. 601, 143 C. C. A. 123, S. C. secs. 56, 126.

Some analogous cases, which do not refer to section 62 and are not strictly governed by the doctrine of Price v. Neal may yet be cited here.

Plaintiffs, drawees of a genuine draft, which was accompanied by forged bills of lading, accepted and paid the draft to defendant, a *bona fide* purchaser of the draft. *Held,* plaintiffs could not recover back the money. The fact that the word "cotton" was printed or lithographed on the form of draft did not make the draft conditioned on the genuineness of the bills of lading. Springs v. Hanover Nat. Bk., 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241, S. C. sec. 3-2.

In Guaranty Trust Co. v. Grotian, 114 Fed. Rep. 433, 52 C. C. A. 235, a bill of exchange payable sixty days after sight and containing the words, "and charge the same to account of 8417.50 bushels of flax seed," was accepted as follows: "Accepted, payable at Lloyd's Bank, Ltd., London, against indorsed bills of lading for 8417 bushels of flax seed, per Buffalo S. S. at New York, etc." It was held that this acceptance was conditional on delivery of

genuine bills of lading and that upon discovery that the bills of lading were forged, the acceptor who had paid the draft could recover the money.

In Hannay v. Guaranty Trust Co. of New York, 187 Fed. Rep. 686, the plaintiff accepted generally a draft containing the provision, "charge the same to the account of R. S. M. I. 100 bales of cotton," with what purported to be a bill of lading for the cotton attached. The draft and the bill of lading were indorsed to the defendant bank and upon maturity of the draft it was paid by the plaintiff's bank. Upon discovery that the bill of lading was a forgery and that no cotton was shipped, the plaintiff sued the defendant for the recovery of the money. It was held on demurrer to the complaint that the acceptance and payment of the draft were conditional on the genuineness of the bill of lading and that the demurrer should be overruled. Only two cases were cited to support the decision, namely, Guaranty Trust Co. v. Grotian, *supra*, in which the acceptance was quite different, and National Bank v. Merchants Bank, 91 U. S. 92, which does not seem to have any application. After the trial of this case, which resulted in favor of the plaintiff, the judgment was reversed by the Circuit Court of Appeals in Guaranty Trust Co. v. Hannay, 210 Fed. Rep. 810, on the ground that the rights of the parties were governed by the law of England, the draft having been drawn in the United States on the Bank of Liverpool, the agent of Hannay. It is to be observed that in neither of the two foregoing cases was the Negotiable Instruments Law referred to by counsel or by the court. Subsequently the Guaranty Trust Co. brought an action [1] in England against Hannay claiming declarations that the bill was an unconditional bill of exchange by the Bills of Exchange Act, hat its acceptance was unconditional and that they did not, by presenting the bill for acceptance with the bill of lading attached, warrant the genuineness of the bill of lading by the law of England, and that they were not bound to repay the amount of the bill. Hannay counterclaimed for a declaration that the plaintiffs were liable to repay the money to the defendant. The Court of Appeals,[2] in elaborate opinions by Pickford, Warrington and Scrutton, JJ., rightly held that the acceptance was unconditional, both according to the Bills of Exchange Act and the Negotiable instruments Law and that the acceptors could not recover the money paid to the holder of the bill.[2]

Defendant accepted a draft held by plaintiff and secured by a warehouse receipt for goods. At maturity, defendant tendered to plaintiff a certified check. The draft and warehouse receipt could not then be found. They were found later in the day and the draft was presented to defendant and payment refused. *Held*, that defendant was not released because of the failure to surrender

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[1] [1918], 1 K. B. 43, 117 L. T. R. 754.

[2] Guaranty Trust Co. v. Hannay [1918], 2 K. B. 623 (C. A.). See review of this case and excellent discussion of the subject, by Professor Chafee, in 32 Harvard Law Rev. 560.

the warehouse receipt when he made the tender. First Nat. Bank v. Gidden, 175 App. Div. 563, 162 N. Y. Supp. 317.

Section 62 is a re-enactment of section 54 in the English Bills of Exchange Act. It has been sharply criticised by a learned writer,[1] because, although it is, in truth, declaratory of the common law of England, it does not in terms recognize any of the equitable exceptions, *e. g.,* negligence of the holder, in taking the instrument, which have generally been recognized in this country. Only two cases, however, have been found, namely, National Bank of Commerce v. Mechanics American Nat. Bank, *supra,* p. 226, and State Bank v. Cumberland Savings, etc., Co., *supra,* p. 226, which seem to hold that the drawee can not recover, even though the holder was negligent. In the following cases the courts have read into the section equitable exceptions to the doctrine of Price v. Neal, which had previously been recognized under the American law merchant. Farmers Nat. Bank v. Farmers & Traders Bank, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915A, 77; National Bank of Rolla v. First Nat. Bank of Salem, *supra,* p. 226, *semble;* State Bank v. First Nat. Bank, *supra,* p. 226, *semble;* State Nat. Bank v. Bank of Magdalena, *supra,* p. 226, *semble;* First Nat. Bank v. Bank of Cottage Grove, *supra,* p. 226; Williamsburgh Trust Co. v. Tum Suden, 120 App. Div. 518, 105 N. Y. Supp. 335, S. C. sec. 66; Canadian Bank of Commerce v. Bingham, 30 Wash. 484, 71 Pac. 43.

In First Nat. Bank v. Bank of Wyndmere, 15 N. D. 299, 108 N. W. 540, 10 L. R. A. (N. S.) 49 [1906], the rule of Price v. Neal was repudiated and the drawee of a forged check allowed to recover the money paid to the holder. Although the bill was made since the Negotiable Instruments Law was adopted in North Dakota, no reference whatever is made to the statute, either by counsel or the court, and naturally none of the cases above cited construing section 62 were reviewed, since they had not been decided at that time.

In Pennsylvania a statute passed in 1849 abrogated the rule of Price v. Neal and permitted the drawee of a forged negotiable instrument to recover money paid thereon. The learned writer, already quoted,[2] expressed the opinion that this statute had been repealed by section 62 and said, "It is inconceivable that any legislature should intend that a paying drawee can recover back money paid to a holder on a forgery of the drawer's name and yet be liable on his acceptance to that holder if sued thereon. He would be compelled to pay and instantly permitted to recover what he had paid. Facts constituting no defense would yet grotesquely constitute a cause of action." But the Pennsylvania

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[1] Hening, The Uniform Negotiable Instruments Law, 59 U. of P. Law Rev. 471, 493 *et seq.*

[2] Hening, The Uniform Negotiable Instruments Law, 59 U. of P. Law Rev. 498, n. 89.

courts, in cases arising since this opinion was expressed, have held that the Act of 1849 was not repealed and that the drawee who has paid a forged negotiable instrument may recover from the holder. Union Nat. Bank v. Franklin Nat. Bank, 249 Pa. 375, 94 Atl. 1080, S. C. sec. 137; Colonial Trust Co. v. National Bank of Western Pennsylvania, 50 Pa. Super. Ct. 510. In these cases the courts argued that since by section 132 an acceptance must be in writing and the instruments were therefore not accepted, section 62 has no application to the case of a payment by a drawee of an unaccepted bill. As has been seen, however, the courts in other states have not limited the operation of section 62 to the case of an accepted bill, but have reasoned that, "A payment of a bill is more than an acceptance, for the one is an obligation to pay, the other a discharge of the indebtedness represented by the bill. If one concludes the drawee it is inconceivable why the other should not,"[1] or that, "The payment of a bill or check by the drawee amounts to more than an acceptance. The rule holding that such a payment has all the efficacy of an acceptance is founded upon the principle that the greater includes the less."[2]

The only way to avoid the grotesque conclusion described by Professor Hening seems to be to hold that where the forged bill is accepted, the acceptor is liable, and that where the payment is after an acceptance, the acceptor can not recover back. But where payment has been made without acceptance, the right of the drawee to recover will depend on the rules of the law merchant under section 196, or the statutory law of the state, if any. But, of course, this is fatal to uniformity.

In Williamsburgh Trust Co. v. Tum Suden, 120 App. Div. 18, 105 N. Y. Supp. 355, S. C. 66, the court spoke of the indorsement of a forged check by the holder when presenting it to the drawee for payment as a warranty or guaranty to the drawee. This statement which appears in some other cases and in textbooks is a fallacy. Such a warranty arises only in case of a sale of the instrument, not when it is presented to the drawee for payment.[3]

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[1] Nat. Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513, *supra*, p. 226.

[2] First Nat. Bank v. Bank of Cottage Grove, 59 Ore. 388, 117 Pac. 293, *supra*, p. 226.

[3] Dedham Bank v. Everett Bank, 177 Mass. 392, 59 N. E. 62; First Bank v. City Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637; National Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513, S. C. sec. 62; National Bank of Commerce v. Mechanics Am. Nat. Bank, 148 Mo. App. 1, 127 S. W. 429; State Bank v. First Nat. Bank, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (N.S.) 100; National Bank of Commerce v. Farmers' Bank, 87 Neb. 841, 128 N. W. 522; Bank v. Cumberland Co., 168 N. C. 666, 85 S. E. 5, L. R. A. 1915D, 1138; Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817, S. C. sec. 66; Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117, S. C. secs. 14, 66.

For a well founded criticism of this erroneous statement, see 56 Am. Law Reg. (N. S.) (now U. of P. Law Rev.) 122. See also, 17 Harvard Law Rev. 581-583, and section 66 *infra,* p. 249.

In South Dakota the rule of Price v. Neal had been repudiated before the adoption of the Negotiable Instruments Law in that state. Since then the Supreme Court, by a course of reasoning difficult to follow and impossible to agree with, has found a way to adhere to its old rulings.[1] This was done by asserting that since by section 65 every person negotiating an instrument by delivery or by qualified indorsement, warrants that the instrument is genuine and in all respects what it purports to be, and since section 30 declares that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee a holder thereof, the holder warrants the genuineness of a draft to the drawee who pays it. It is a novel construction of these sections that under them a holder negotiates a bill or check when he surrenders it to the drawee upon payment, and that the drawee "by making payment" becomes a holder. The definition of "holder" in section 191 is made with reference to live instruments, not those which have been discharged by payment. The drawee, who has paid the instruments, is not "the payee or indorsee of a bill or note," although he is in possession of it and therefore does not become a holder. But even on the court's own construction of sections 65 and 66, the judgment was wrong The court said that under section 66 the warranty of the negotiator runs only to holders in due course and that the drawee "is not and can not become a holder in due course," but that under section 65 he becomes a holder to whom the negotiator warrants the genuineness of the instrument. But section 65 applies only to a person negotiating an instrument by delivery or by a qualified indorsement, whereas, in the case under consideration, the holder, who presented it for payment and who received payment, indorsed without qualification, and his liability was therefore defined by section 66, according to which, the court said the drawee could not recover back the money.

The court in this case, also, made the remarkable discovery that section 188 (186, South Dakota Act), by which the drawer and indorsers are discharged when the holder procures a check to be certified, excludes the application of section 62 to checks and that therefore the admissions specified in section 62 have no application to checks. According to this reasoning a bank, which accepts or certifies a check, not only does not admit the existence of the drawer of the check, whether genuine or forged, or his capacity or authority to draw, but does not even admit the existence of the payee and his then capacity to indorse. Section 185 provides "except as herein otherwise provided, the provisions of this act applicable to a bill of exchange, payable on demand, apply to a check," and there is nothing in any of the other sections relating

[1] First Nat. Bank v. Brule Nat. Bank, 38 S. D. 396, 161 N. W. 616.

to checks, which prevent the application of section 62 to them.

Section 188 has no bearing whatever on the effect of presentment for payment and payment of a check. It applies only where a holder of a check, instead of presenting it for payment, chooses to have it accepted or certified. Another criticism may be made upon the opinion in this case. It would seem that the court either did not examine carefully a number of the cases cited by it or misconceived them. For instance, the court said (p. 404): "There is, however, a line of decisions holding that the original payee by indorsing the instrument impliedly warrants, not only to subsequent holders in due course, but also to the drawee that the maker's signature is genuine." Six cases are cited and no one of them sustains the proposition so far as it relates to the drawee. In the first and sixth cases the action was by the bank which cashed the check, not by the drawee. In the first case the check was genuine but had been altered as to payee and amount. In the second, fourth and fifth, the drawee was allowed to recover because they were recognized exceptions to the rule of Price v. Neal, by reason of the negligence of the holder in taking the check. The third case followed Price v. Neal to the full extent and denied recovery by the drawee who had paid a check on which the drawer's name was forged.

This case is only another and a specially striking example of the strained reasoning by which some courts evade the provisions of the act in order to hold to the former law of the state, and is an instance of the fallacy, repudiated by the great majority of the courts, of treating presentment for payment as a negotiation, having the same effect as a sale in raising a warranty, and regarding an indorsement in such a case as creating a liability instead of operating merely as a receipt. See cases cited *infra*, p. 249.

Sec. 63. When Person Deemed Indorser.

A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.[1]

In dealing with irregular indorsements the courts sometimes refer only to section 63, sometimes only to section 64, sometimes to both sections. Therefore the cases, herein cited under both sections, should be consulted.

[1] "Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." B. E. A. s. 56.

Hopkins v. Merrill, 79 Conn. 626, 66 Atl. 174, S. C. secs. 66, 89; Bank of Montpelier v. Lumber Co., 16 Idaho, 730, 102 Pac. 685; Hoyland v. National Bank of Middlesborough, 137 Ky. 682, 126 S. W. 356, S. C. sec. 89; Pugh v. Sample, 123 La. 791, 49 So. 526; Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, S. C. sec. 121; Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455, S. C. secs. 64-1, 82-3; Aronson v. Nurenburg, 218 Mass. 376, 105 N. E. 1056, S. C. sec. 38; Phoenix Nat. Bank v. Hanlon, 183 Mo. App. 243, 166 S. W. 830, S. C. sec. 120-6; Mackintosh v. Gibbs, 79 N. J. L. 40, 74 Atl. 708, S. C. sec. 66; Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 423, S. C. sec. 64; Meyers Co. v. Battle, 170 N. C. 168, S. C. sec. 64; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842, S. C. sec 64-1; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373, S. C. sec. 53, 64-1; Colley v. Summer, etc., Co., 119 Va. 439, 89 S. E. 906, S. C. sec. 2-5; First Nat. Bank v. Towner, 239 Fed. Rep. 433.

Recovery can not be had against an anamolous indorser as maker, even if the petition charges him to be a maker, and parol evidence showing him to be such was admitted without objection. The court is not at liberty to give to the instrument other legal effect than the statute says shall be given to it. Overland Auto Co. v. Winters (Mo. App.), 180 S. W. 561, S. C. sec. 29.

The intent to be bound in some other capacity must be indicated in the indorsement and can not be shown by parol. First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790. "The act does not merely raise a presumption that he is an indorser, but a status is absolutely fixed by it and can not be changed by parol proof." Lightner v. Roach, 126 Md. 474, 95 Atl. 62. "Section 63 is a statutory command that the legal effect of a blank indorsement can not be changed or varied by evidence from another source." First Nat. Bank v. Korn (Mo. App.), 179 S. W. 721, S. C. secs. 71, 155. See also other cases to the same effect cited under section 64.

But there seems to be no reason why the intent to be bound in some other capacity may not be found on the face of the instrument, and it was so held in Hibernia Bank v. Dresser, 132 La. 532, 61 So. 561, in which case the note read, "We, the signers, indorsers, sureties and all of us *in solido*, promise to pay, etc." The signers on the back before delivery were held bound *in solido* with these on the face and to the same extent and were not entitled to notice of dishonor, since the words quoted indicated an intention to be bound in some other capacity than as indorsers. Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 184, 192, accord.

But in J. M. Dresser Co. v. Hibernia Bank, 136 La. 314, 67 So. 15, where another note in the same form was involved, it was held that one, who had signed his name upon the back of the note, could not be regarded as a maker in the sense that securities pledged by the maker signing upon the face to secure the payment of the note, and "any other indebtedness then due or thereafter to

become due by the maker of this note," could be applied to other indebtedness of the one who signed upon the back. The court said, "If the Negotiable Instruments Act be applied to the case, Dresser's status is that of an indorser, though by having promised *in solido* with all the other parties and unconditionally to pay, he may have deprived himself of some of the rights of an indorser."

Where plaintiff was required to indorse a check payable to another before it was cashed by the bank, as he had previously been required to do on presenting checks payable to the same person, and as was also in accordance with the custom of the bank to require every person, who presented a check for payment, to sign his name on the back for the purpose of holding him for the check, plaintiff's indorsement amounted to a contract to indemnify the bank if the check was not paid and the bank was entitled to charge the check back to plaintiff's account, if it was not paid. The N. I. L. was not cited, although the check was dated after the passage of the act. Arkansas Nat. Bank v. Gunther, 127 Ark. 149, 191 S. W. 901.

Under this section, one who indorsed in blank can not show by parol that he signed merely as agent for a prior party and was not individually liable. Eaves v. Keeton (Mo. App.), 193 S. W. 629, S. C. secs. 68, 118.

This section abrogates the former rule in New Jersey that the signature of a third person upon the back of a negotiable instrument prior to its delivery to the payee creates *per se* no implied or commercial contract. Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 64, 64-1, 68. See also cases under section 64-1.

Upon a sale of property, the seller required the buyer to procure an indorser to a note to be given for part of the price. The buyer executed a note to the seller with the blank indorsement of the defendant. *Held*, that defendant was liable as an indorser and not as a maker. Roessle v. Lancaster, 130 App. Div. 1, 114 N. Y. Supp. 387, affirmed without opinion, 205 N. Y. 626.

The payee of a note, who indorsed it to enable the maker to negotiate it for his own benefit, is liable merely as an accommodation indorser and is discharged if no notice of dishonor is given. Mechanics' & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439, S. C. secs. 109, 196.

Where defendant indorsed a note in blank after delivery, so that the payee "could collect from the other party," the defendant can show as against the payee and one not a holder in due course that there was no consideration for the indorsement and that he is not liable, notwithstanding section 63 of the Negotiable Instruments Law. Sangster v. Bricker (Ind. App.), 118 N. E. 383.

The defendants, who were respectively president and secretary and also directors and large stockholders in a corporation, indorsed a note made by the corporation to raise money. When the note matured the company had no money to pay it, as defendants knew. *Held*, that defendants were liable only as indorsers and could

not be held without presentment and notice of dishonor. McDonald v. Luckenbach, 170 Fed. Rep. 434, 95 C. C. A. 604.

Directors of a company signed their names upon the back of a note made by the president to the company for the purchase of stock to be issued by the company. It was held, that they were indorsers and entitled to notice of dishonor, that they could not be treated as primarily liable, on the theory that the purchase was for the benefit of the indorsers as well as for the benefit of the president, that fact not appearing on the note, and there being also no substantial evidence to that effect. Murray v. Third Nat. Bk., 234 Fed. Rep. 481, 148 C. C. A. 247, *semble*, S. C. secs. 64, 70, 80.

Accommodation indorsers of a note were a majority of the directors of a corporation which was the maker. *Held*, that they were nevertheless entitled to notice of dishonor. Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 692, Ann. Cas. 1917B, 835, S. C. sec. 89; First Nat. Bank v. Bickel, 143 Ky. 754, 137 N. W. 790; Bennett v. Kistler, 163 N. Y. Supp. 555, S. C. sec. 68; Nolan v. H. E. Wilcox Co., 137 Tenn. 667, 195 S. W. 581, S. C. sec. 115, overruling Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390, *infra*, section 115, p. 310.

The president of a corporation who writes his name on the back of the company's note without the addition of any qualifying words, is an indorser, parol evidence being inadmissible to show an intention to be bound as maker. Mechanic v. Elgie Iron Works, 163 N. Y. Supp. 97, S. C. sec. 112.

A partnership procured E, an employe, to execute a note payable to his own order and indorsed in blank. The note was then indorsed by the defendant, one of the partners, and discounted at the plaintiff bank by another partner for the benefit of the firm. *Held*, that the defendant is released by failure of the plaintiff to make proper demand and notice. First Nat. Bk. of Lincoln v. Sandmeyer, 164 Ill. App. 98.

A partner who individually indorses a firm note adds to his liability as maker a several and distinct liability as indorser, and may be sued as such. Nat. Exch. Bank v. Lubrano, 29 R. I. 64, 68 Atl. 944. He is "a person not otherwise a party" and the note may properly be proved against his individual estate. Fourth Nat. Bank v. Mead, 216 Mass. 521, 104 N. E. 377, 57 L. R. A. (N. S.) 225.

Where defendant's signature appeared with another in the place for the maker's name, he is not deemed an indorser, although the body of the instrument names the other signer as a promisor without mention of defendant's name. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, S. C. secs. 17-6, 64.

The signature of the payee of a note written on the back under the words, "Payment guaranteed. Protest waived," constitutes a commercial indorsement passing the title free from equities to an innocent purchaser. The court states that this is the weight of authority and cites many cases pro and con. Mangold and Glandt Bank v. Utterback (Okla.), 160 Pac. 713.

But a stranger who indorses on the back of a note, "I hereby guarantee payment of the within note," thereby indicates his intention to be bound as guarantor and is not an indorser. Noble v. Beeman-Spaulding Co., 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162, S. C. secs. 29, 63, 68, 121, 192.

Defendants describing themselves as "we the undersigned indorsers" signed their names on the back of a note waiving presentment and demand for payment and notice of dishonor and nonpayment, and added, "We, or either of us, guarantee payment of the within note." *Held*, that they were liable both as indorsers and guarantors. The N. I. L. was not cited. Toler v. Sanders, 87 W. Va. 398, 87 S. E. 462.

An indorser of a note, who was not injured by want of notice of dishonor of a check, indorsed by him as conditional part payment of the note, although discharged from liability on the check, is not entitled to a credit of the amount of the check on the note. American Nat. Bank v. Nat. Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 96, 97.

Sec. 64. Liability of Irregular Indorser.

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:—

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.[1](*a*)
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.[2](*b*)
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.[1](*c*)

The Illinois Act substitutes for subsections 1 and 2 the changes advised by Professor Ames (*infra*, p. 427).

Young v. Exchange Bank of Kentucky, 152 Ky. 293, 153 S. W. 444, Ann. Cas. 1915B, 148, S. C. sec. 89; Thorpe v. White, 188

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[1] Not in B. E. A.

[2] See note 54 above.

Mass. 333, 74 N. E. 592, S. C. secs. 52, 64-1, 124; Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, S. C. sec. 121; Roessle v. Lancaster, 130 App. Div. 1, 114 N. Y. Supp. 387, S. C. sec. 63; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, S. C. sec. 89; McLean v. Bryer, 24 R. I. 599, 54 Atl. 363, S. C. secs. 53, 64-1; Union Bank v. Commercial Securities Co., 163 Wis. 470, 157 N. W. 510, not citing the N. I. L.

The payee in order to hold an indorser under this section must allege and prove that the indorsement was made before delivery, and the burden of proof to establish the fact is upon him. Bender v. Bahr Trucking Co., 144 App. Div. 472, 129 N Y. Supp. 737.

A note recited, "The A. B. Co. promise to pay to the order of C," and was signed "A. B. Co., E. R. S. Treasurer, J. W. M." *Held*, section 64 was not applicable, because J. W. M. did not place "his signature in blank" on the note and he was therefore not liable as indorser. That there was a plain ambiguity on the face of the note, and that evidence was admissible even against a holder in due course to show that J. W. M. was secretary of the A. B. Co. and intended to sign as such but omitted his title by mistake. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, S. C. secs. 17-6, 63.

This section deals only with the liability of an irregular indorser to the payee and subsequent parties and does not confine the rights and liabilities of several irregular indorsers as between themselves. This is done by section 68. Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 64-1, 68.

One who indorses under this section is entitled to the same defenses as to legality or consideration as the maker for whose accommodation he signed. Leonard v. Draper, 187 Mass. 536, 73 N. E. 644, *semble*, S. C. sec. 66.

The Negotiable Instruments Law governs a renewal note made after the passage of the act, although the original note was given before the act, especially where there were new indorsers on the renewal note making in law a new contract with different parties. Walker v. Dunham, 135 Mo. App. 396, 115 S. W. 1086.

The signature in blank of one not otherwise a party before delivery, makes the signer an indorser under the Negotiable Instruments Law, which changes the law in Pennsylvania. But where the directors of a corporation indorse its notes for the benefit of the corporation, and afterwards accept the benefits of a deed of trust of the corporation's property to indemnify them against loss as such indorsers, they become principals, and can not rely on the defense of non-presentment and lack of notice of dishonor. *In re* Aldred's Estate (No. 1), 229 Pa. 627, 79 Atl. 141, S. C. sec. 115. See this case adversely criticised in 24 Harvard Law Rev. 665.

(*a*) This section has no application to a case where the signature was placed on the instrument after its delivery to the payee.

Kohn v. Consolidated Co, 30 Misc. Rep. 725, 63 N. Y. Supp. 265. *Secus,* if the indorsement, though made after the note comes into the possession of the payee, was made in pursuance to an agreement between the parties that the note should be so indorsed to be acceptable. Downey v. O'Keefe, 26 R. I. 571, 59 Atl. 929, *semble.* See also, American, etc., Co. v. Grant, 135 Minn. 208, 160 N. W. 676, not citing the N. I. L.

By force of this section and section 63 the law has been changed in states which have adopted the N. I. L. and in which a person signing in blank before delivery, for the accommodation of the maker, was formerly held to be a joint maker or guarantor. Now he is an indorser, and is chargeable only after presentment and notice of dishonor. Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847, S. C. sec. 120-6;[1] Peck v. Easton, 74 Conn. 456, 51 Atl. 134, S. C. sec. 89; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. sec. 109; Thorpe v. White, 188 Mass. 333, 74 N. E. 592, S. C. secs. 52, 124; Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455, S. C. sec. 82-3. See also, Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413, S. C. secs. 63, 64, 68; Gibbs v. Guaraglia, 75 N. J. Law 168, 67 Atl. 81; Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709; Kohn v. Consolidated Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265; Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 423; Farquhar Co. v. Higham, 16 N. D. 106, 112 N. W. 557; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373, S. C. sec. 53; Norwood Nat. Bank v. Piedmont Co. (S. C.), 91 S. E. 866, S. C. sec. 73; *In re* Swift, 106 Fed. Rep. 65, S. C. sec. 82-3.

And in an action by the payee against the indorser under this section, an allegation and evidence of the intention of the indorser to be liable to the payee is unnecessary and immaterial. Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709; Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658; McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000, *semble;* Kohn v. Consolidated Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265, *semble.* See also, Gibbs v. Guaraglia, 75 N. J. Law 168, 67 Atl. 81, and Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 68.

And parol evidence of a contrary intention is not admissible. The statute fixes the status of the indorser. Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886; Hopkins v. Commercial Bank, 64 Fla. 310, 60 So. 183; Porter v. Moles, 151 Iowa, 279, 131 N. W. 23; First Nat. Bk. v. Bickel, 143 Ky. 754, 137 S. W. 790; Lyons Lumber Co. v. Stuart, 147 Ky. 653, 145 S. W. 376; Nesho Milling Co. v. Farmers Co., 130 La. 949, 58 So. 825; Lowry v. Wilkinson, 135 La. 105, 64 So. 1003, S. C. sec. 86; Lightner v. Roach, 126 Md. 474, 95 Atl. 62; Ensign v. Flagg, 177 Mich. 317, 143 N. W. 82, S. C. secs. 124, 125; Mechanic v. Elgie Iron Works, 98 Misc. Rep.

[1] The court cited only section 63, but the facts and the reasoning of the court bring the case also under section 64-1.

620, 163 N. Y. Supp. 97, *semble*, S. C. secs. 63, 112; Myers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034, S. C. sec. 82; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 327, 83 N. E. 392, 14 L. R. A. (N. S.) 842; Thompson v. Curry (W. Va.), 91 S. E. 801; Murray v. Third Nat. Bank, 234 Fed. Rep. 481, 485, 148 C. C. A. 247, *semble*, S. C. secs. 63, 70, 80. See also cases cited under section 63.

Contra are Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390, S. C. sec. 115 (but see, Pharr v. Stevens, 124 Tenn. 669, 139 S. W. 670, and Nolan v. Wilcox Co., 137 Tenn. 667, 195 S. W. 581. S. C. *infra*, secs. 63, 115), and Kohn v. Consolidated Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265, *semble*.

In Long v. Gwin, 188 Ala. 196, 66 So. 88, it was held that it may be shown by parol evidence whether an irregular indorser signed as maker or indorser. The date of the note is not given but it must have been before the adoption of the Negotiable Instruments Law as the act is not cited.

In Van Kleek v. Channon, 175 Ill. App. 626, it was held that one who writes his name on the back of a note prior to its delivery is presumed to be a guarantor. This case is wrong, if the note was made after 1907 (the date of the adoption of the Negotiable Instruments Law in Illinois), as it probably was, since the case was decided in 1912. No reference was made to the act and the only case cited was an Illinois case in which the note was made fifteen years before the passage of the act and therefore under the old law of the state.

In Burke v. Jefferson Bank, 180 S. W. 500, affirmed without report, in 121 Ark. 633, the court said that one who indorsed a note before delivery was "a joint maker and not entitled to notice of default," citing certain old cases. The attention of the court was probably not called to section 64 of the Negotiable Instruments Law which went into effect in the state several months before the date of the note.

In Tancred v. First Nat. Bank, 124 Ark. 154, 187 S. W. 160, it was held that one, indorsing a note before delivery, becomes, so far as the face of the note is concerned, a joint maker, but it may be shown by parol evidence that he signed as a surety, citing Vandeventer v. Davis, 92 Ark. 604. The note appears to have been made May 12, 1913. The N. I. L. was approved February 21, 1913, to take effect sixty days from and after its passage. Therefore it seems that this note was governed by the N. I. L. and that under section 64 the defendant was an indorser and not a joint maker. The N. I. L. was not cited and apparently counsel and court were unaware of its adoption.

To give credit to a note, plaintiff and defendant agreed to become accommodation co-makers. Plaintiff signed as a co-maker and there being no more room on the face of the note, defendant wrote his name on the back. No notice of dishonor of the note was given to defendant. The payee sued and recovered of the plaintiff, who sued the defendant for contribution. *Held*, oral evidence is admissible to show that plaintiff and defendant were

co-sureties, and that plaintiff is entitled to contribution. Hunter v. Harris, 63 Ore. 505, 127 Pac. 786.

(*b*) AMES: This section is an otherwise excellent piece of codification, but defective, because under subsection 2 a party, signing as indorser for the accommodation of an acceptor, would not be liable to a drawer-payee, but only to subsequent parties. This omission can be remedied by an amendment as follows:

"1. If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer,[1] he is liable to the payee and to all subsequent parties.

2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer."

BREWSTER: Misapprehends Professor Ames' criticism and so fails to answer it.

MCKEEHAN: Agrees with Professor Ames that the section is defective and that his suggested amendment would improve it.

It has, however, been contended that, while Professor Ames' amendment would improve section 64, yet both sections 63 and 64, construed as they have been in nearly all the cases, as prohibiting parol evidence to establish a different relation of the anomalous indorser to the other parties to the instrument, run counter to some established principles of suretyship and cause injustice in some cases.[2] But these sections attempt only to define the legal ability of the anomalous indorser, and seem to place no more obstacles in the way of such indorser setting up and proving by oral evidence any equities he may have against the party suing him, than do other sections of the act which define the liability of the other parties, the maker, acceptor, drawer and regular indorser.

One, who indorsed a bill in blank before delivery, for the purpose of backing the acceptor, is liable to the drawer-payee, who had indorsed and transferred the instrument and was compelled to take it up. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 29, 64-3, 68. In this case the court

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[1] It has been suggested that the words "or to bearer" should be inserted after "drawer" in the third line of the amendment proposed, since the drawer, as bearer, should be able to hold the indorser as backer for the acceptor. Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Rev. pp. 588, 589.

[2] Hening, The Uniform Negotiable Instruments Law, 59 U. of P. Law Rev. 476, 532 *et seq.*

reached the desirable result advocated by Professor Ames without an amendment of the section, by holding that sections 63 and 64-2 merely established a presumption and that parol evidence was admissible to show an intention that the indorser should be liable to the drawer. It is submitted that this decision nullifies the plain language of section 64-2, which defines the parties to whom an anomalous indorser of a bill, payable to the drawer's order, is liable, and does not merely enact a rule of evidence. See cases cited under the preceding subsection. An aval or backer to an acceptor was not recognized at the common law. Steele v. M'Kinlay, 5 App. Cas. 754.

In Jenkins v. Coomber [1898], 2 Q. B. 168, it was held that, where A drew a bill on B, payable to his own order, which B accepted, and C, in accordance with a previous agreement to guarantee its payment, wrote his name on the back, and the bill was delivered to A, C was not liable to A as indorser, as the bill had not been indorsed by A before C put his name on the back. That Steele v. M'Kinlay, 5 App. Cas. 754, was not changed by section 56, B. E. A.[1] corresponding to section 63, N. I. L.

It has, however, since been held in Glenie v. Bruce Smith [1908], 1 K. B. 263, where one T wrote his acceptance across the face of a blank bill form and the defendant indorsed it, and the bill was then delivered to plaintiff, who filled it up as drawer, payable to himself, and then indorsed it, that defendant was liable to plaintiff because under section 20 B. E. A. (section 14, N. I. L.), the defendant was estopped from saying that his name was put on the bill as indorser before the drawer had made it a bill by indorsing it. Still later, upon a state of facts similar to those in Jenkins v. Coomber, that case was followed and Glenie v. Bruce Smith again distinguished on the ground that it was governed by section 20. M. T. Shaw & Co. v. Holland [1913], 2 K. B. 15. It thus appears that in England the indorsement of a blank bill is more efficacious in holding the indorser liable to the drawer-payee, who fills up and indorses the bill after he receives it, than is a bill indorsed and complete when delivered to the drawer-payee, except as to the drawer's indorsement. Certainly an anomalous result.

It would seem that since the payee may be a holder in due course[2] there ought to be no difficulty, in England, in holding the anomalous indorser directly liable to the payee, under section 56 of the Bills of Exchange Act, without having the payee go through the form of first indorsing the instrument and delivering it to the intended backer to have him indorse it, and return it to the payee, so that the latter may sue as a subsequent indorsee.

And it has been held in Robinson v. Mann, 31 Canada Supreme Court Reports, 484, that under section 56 of the Canadian Bills of Exchange Act of 1890, which is substantially the same as section 56

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1 *Supra*, p. 232, n. 1.

2 *Supra*, pp. 49 *et seq.*, and pp. 162 *et seq.*

of the English Act, one who indorses a note may be liable as an indorser to the payee, although it had not been first indorsed by the payee. That the statute adopts the aval form of liability of the French Commercial Law, and that the payee is a holder in due course. See also, McDonough v. Cook & Crawford, Ontario Court of Appeals, April 5, 1909, 45 Canadian Law J., accord.

The terms of section 64-2 of the Negotiable Instruments Law, however, forbid such a holding, although as above stated, the New York Court of Appeals, in Haddock, Blanchard & Co. v. Haddock, *supra,* p. 240, by admitting parol evidence of the intention of the indorser and by a forced construction of section 68 held an anomalous indorser for the acceptor liable to the drawer-payee.

The construction put by the New York Court of Appeals on section 64-2 seems fatal to uniformity. By the common law of New York the anomalous indorser of a bill might perhaps have been made liable, as indorser, to the drawer-payee by the use of the same fiction that was adopted in the case of the anomalous indorser of a note in Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326, but this could not have been done in states where it was held, that a stranger, who wrote his name on the back of a bill before delivery, could not be an indorser because he was neither payee nor holder and so must be a drawer. Phoenix Co. v. Fuller, 3 Allen, 441; Church v. Swope, 38 Ohio St. 493.

The New York Court of Appeals also relied upon section 68, but it is submitted that it is a fallacy to say that a drawer is an indorser in his relation to parties signing on the back of the bill subsequent to the drawing, and that section 68 does not affect the question involved in section 64-2. See Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413, *supra,* p. 238, and First Nat. Bank v. Bickel, 143 Ky. 745, *supra,* p. 233.

Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390, S. C. *infra,* sec. 115, is in accord with Haddock, Blanchard & Co. v. Haddock, and Kohn v. Consolidated Co., *supra,* in holding that sections 63 and 64 merely create a presumption that the real contract may be shown by oral evidence, that one who indorsed before delivery may be shown to be a joint maker and so not entitled to notice of dishonor. For the reasons already stated, it is submitted that this decision is also erroneous and to be regretted.

The maker of a note, payable to his own order, simply promises to pay, and the drawer of a bill, payable to his own order, simply orders payment to be made to the person he may designate. But neither the maker of such a note nor the drawer of such a bill is in the legal sense of the term an indorser when he writes his name on the back of the instrument. Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 35 L. R. A. 786, 60 Am. St. Rep. 719; Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 145.

(*c*) The indorsement of a note before delivery gives rise to a presumption that the indorser is liable to the payee. But the presumption may be rebutted by evidence that the indorsement was

for the accommodation of the payee. Franklin v. Kidd, 219 N. Y. 409, 114 N. E. 839.

And if it appears that the indorsement was after delivery to the payee for his accommodation and without consideration, the indorser is not liable to the payee. Flinch v. Wood, 145 N. Y. Supp. 51.

Parol evidence is admissible to establish whether the indorser signed for the accommodation of the payee. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 29, 64-2, 68; Howard v. Van Gieson, 56 App. Div. 217, 67 N. Y. Supp. 620; Meyers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034.

Sec. 65. Warranty Where Negotiation By Delivery, Etc.

Every person negotiating an instrument by delivery or by a qualified indorsement, warrants,—

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.(*a*)

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.[1]

Willard v. Crook, 21 App. D. C. 237, S. C. sec. 66; State v. Corning Savings Bank, 139 Iowa, 338, 115 N. W. 937; Middle-

[1] "(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery.' (2) A transferor by delivery is not liable on the instrument. (3) A transferor by delivery who negotiates a bill, thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless." B. E. A. s. 58. There appears to be no special provision in the English Act as to the liability of an indorser with qualifications. See Chalmers, 6th ed. 40.

borough Nat. Bank v. Cole, 191 Mass. 167, 77 N. E. 781; Hawkins v. Wiest, 167 Mo. App. 439, 151 S. W. 497, S. C. sec. 114-4; Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank, 134 Tenn. 379, 183 S. W. 1006, S. C. sec. 9-3.

The payee of a note secured by chattel mortgage transferred the note and mortgage, indorsing the note as follows: "By agreement with recourse after all security has been exhausted waiving protest." *Held,* that the indorser was liable only for the balance due after the security has been exhausted, and as no cause of action accrues against him until the security is exhausted he can not be joined as a defendant in the action to foreclose the mortgage. Smith v. Bradley, 16 N. D. 306, 112 N. W. 1062.

An action for cancellation of a note because cashier's checks received therefor were worthless is not an action for breach of warranty in negotiation of the checks, and is therefore not governed by this section. Dille v. White, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510, S. C. *supra,* sec. 6-5.

The transferor by delivery of a forged note is not released from liability as warrantor by the act of the transferee in receiving interest from the alleged maker and extending the note, without the consent of the transferor, all the parties being still in ignorance of the forgery. Cluseau v. Wagner, 126 La. 375, 52 So. 547.

Where a check on which the payee's indorsement was forged has been several times transferred by indorsement, each indorsee may recover from his immediate indorser. Main St. Bk. v. Planters Nat. Bank, 116 Va. 137, 81 S. E. 24. The court cited section 65, but as the indorsements were unqualified, it should have cited section 66.

An indorser "for collection" warrants that the instrument is genuine and that he has good title to it, etc. The court cited section 64, but evidently section 65 was meant. *In re* Zregenhein (Mo. App.), 187 S. W. 893, S. C. sec. 9-4, *semble.*

(*a*) AMES: 1. The warranty of an indorser without recourse should run only to his immediate transferee. The liability being extrinsic to the bill should be the same as that of a transferor by delivery. There is no authority for the distinction made in this section (subsection 4), and Watson v. Cheshire, 18 Iowa, 202, 87 Am. Dec. 382, is directly opposed to it, and holds that a subsequent transfer or indorsement is not of itself an assignment of the warranty of the indorser without recourse.

2. By this section (subsection 4) the transferor of an instrument, void for usury, is not liable as warrantor, unless he was aware of the usury, thus codifying the discredited case of Littauer v. Godman, 72 N. Y. 506, 28 Am. St. Rep. 171, although he is made liable as warrantor, irrespective of his knowledge, if the instrument is void for coverture or voidable for infancy. Again,

if knowledge is necessary in the case of an indorser without recourse, why not also in the case of an indorser without qualification? Yet subsection 4 of section 65 is not incorporated in section 66 as are subsections 1, 2 and 3 of section 65.

3. In subsection 4 the last words "it valueless" should be changed to "its collectibility." The warranty should attach if the instrument is worth, for instance, fifty cents on the dollar.

BREWSTER: In 2 Ames Cases on Bills and Notes, 840, 882, an indorser without recourse is made liable to his indorsee and subsequent holders.

Makes no answer to Professor Ames' second and third criticisms on subsection 4.

AMES: The passage referred to by Judge Brewster was a youthful indiscretion, but, even there, no distinction was made between the indorser without recourse and the transferor by delivery, the writer erroneously conceiving that in both cases the warranty ran to subsequent holders.

MCKEEHAN: 1. Discusses the difference between the English theory of estoppel against the indorser without qualification, precluding him from denying not only to his indorsee but to any holder in due course, his title, the genuineness of the instrument, etc., and the prevalent American theory that an indorsement includes a warranty of the same things to the indorsee and to subsequent holders and shows that while the Negotiable Instruments Law in sections 61 and 62 follows the English Act in expressing the liabilities of the maker, drawer and acceptor, it departs from the English Act as to the theory of the indorser's undertakings and in sections 65 and 66, N. I. L., adopts the theory of warranty, and applies it both to qualified indorsements and to indorsements without qualification.

2. The difference in the effect of indorsements without recourse and transfers by delivery may be justified on the theory that, if the subsequent transfer is by indorsement, such indorsement may be regarded as an assignment of the warranty of the indorser without recourse.

Agrees with Professor Ames that the transferor should be held liable as warrantor if the instrument is void for usury.

Sec. 66. Liability of General Indorser.

Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.[1]

And, in addition, he engages that on due presentment, it shall be accepted or[2] paid, or both,[2] as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The Illinois Act interpolates after "indorser" in line one, the words "not an accommodating party" and after "three" in subsection 1, the words "and four" and substitutes "every indorser" for "he" in the first line of the last sentence.

AMES: This section betrays the same misconception as to warranty as does section 65. Under it an accommodation indorser, though not a vendor, is liable as warrantor, which is unjust and contrary to the authorities. Suggests amendments of section 65 in accordance with his criticisms, which would dispense with all of section 66 between the words "qualification" in the second line and "engages" in the first line of the last paragraph.

BREWSTER: Claims that the section follows the English Act but makes no answer to the criticism of Professor Ames.

MCKEEHAN: Agrees with Professor Ames that the accommodation indorser should not be saddled with the warranties of a vendor.

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[1] "The indorser of a bill by indorsing it * * * (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; (c) Is precluded from denying to his immediate or a subsequent indorser that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto." B. E. A. s. 55 (2).

[2] The English Act reads "and" instead of "or" and omits the words "or both." B. E. A. s. 55 (2) (a).

Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. Supp. 561, affirmed without opinion, 188 N. Y. 610; Peterson v. Thompson, 78 Ore. 158, 151 Pac. 721.

An indorser sued upon his contract of indorsement is absolutely liable thereon. It is not a defense for him to plead in such an action that the maker is solvent. Curtis v. Davidson, 215 N. Y. 395, 109 N. E. 281, S. C. secs. 57, 84.

The rule previously in force in Kentucky requiring the holder to prosecute the maker to insolvency in order to hold the indorser, is repealed by the N. I. L. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350, S. C. secs. 68, 107, 152, 184.

A declaration alleging that the maker signed and delivered a promissory note and that the defendant indorsed the note to plaintiff sufficiently alleges liability of the indorser "according to the tenor." Donegan v. Dekle Inv. Co. (Fla.), 74 So. 11.

In an action by the payee of a promissory note against an indorser without qualification, a plea that the note was not executed or delivered by the maker states no defense and is demurrable. Williams v. Peninsular Grocery Co. (Fla.), 75 So. 17, S. C. secs. 30, 111, 120-6.

Where A was the real owner of a note, payable to B, an indorsement of the note by B to A merely transferred the naked legal title and created no liability as indorser against B. The N. I. L. was not cited. Sawyer State Bank v. Sutherland, 36 N. D. 493, 162 N. W. 696, S. C. sec. 125.

Plaintiff sued defendant as an indorser. The complaint alleged, that plaintiff made the note to his own order and that defendant indorsed the note and delivered it to plaintiff for value. That upon presentment at maturity payment was refused and due notice given to defendant as indorser. *Held,* that the complaint was insufficient. If plaintiff made the note for the accommodation of defendant his remedy is an action for money paid. Abramowitz v. Abramowitz, 113 N. Y. Supp. 798.

A single executor can not, without the concurrence of his coexecutors, indorse the name of a testator on a note, so as to bind the estate. The N. I. L. was not cited on this point. Union Bank v. Sullivan, 214 N. Y. 332, 108 N. E. 558, S. C. secs. 25, 70, 80, 123,

An indorser without qualification, not being allowed to vary, contradict or annul by parol evidence his written contract, can not do this indirectly by charging that plaintiff's representations that he would not be held, were fraudulent. People's Bank v. Baker (Mo. App.), 193 S. W. 632, S. C. sec. 69.

An unqualified indorser of a secured installment note can not vary his contract of indorsement by parol evidence that the indorsee at the time of the indorsement agreed to keep him fully advised as to the conduct of the maker respecting the payment of installments and any action of his touching the value of the secur-

ity, and failed to do so. Hopkins v. Merrill, 79 Conn. 636, 66 Atl. 174, S. C. sec. 89.

In North Carolina an indorser may show by parol evidence as between himself and his immediate indorsee, but not against remote parties without notice, an agreement varying the contract ordinarily implied by the indorsement. The N. I. L. was not cited. Sykes v. Everett, 167 N. C. 600, 83 S. E. 585.

An indorser of a note executed by a corporation by its treasurer can not defend on the ground that the treasurer was not authorized to execute the note. Leonard v. Draper, 187 Mass. 536, 73 N. E. 64, S. C. sec. 64.

Whether a corporation has power to indorse or not, its indorsement passes title (section 22), and a subsequent indorser is liable to a purchaser even though the latter knew that the subsequent indorsement was for the accommodation of the corporation (section 29). Willard v. Crook, 21 App. D. C. 237.

A made a note to the order of B, forged B's indorsement, then procured C's indorsement for A's accommodation, and negotiated the note. *Held,* C by his indorsement, guaranteed the genuineness of B's signature, and was liable to a holder in due course. Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, affirmed without opinion, 180 N. Y. 549, S. C. sec. 124.

Under his warranty that the instrument is valid and subsisting, an indorser without qualification can not defend against a holder in due course, on the ground that the instrument was void because of usury in its inception. Even apart from this section, an indorser's contract is a new and independent contract. Horowitz v. Wollowitz, 59 Misc. Rep. 520, 110 N. Y. Supp. 972; Klar v. Kostiuk, 65 Misc. Rep. 199, 119 N. Y. Supp. 683.

But the warranty of an indorser without qualification, running only to a holder in due course, is not available to a plaintiff who discounts for the maker a usurious note indorsed by defendant for the accommodation of the maker and the indorser may set up the defense of usury. Bruck v. Lambeck, 63 Misc. Rep. 117, 118 N. Y. Supp. 494, S. C. sec. 29.

So, also, where a note made by a corporation was indorsed by defendants before its delivery to the payee, and the consideration was known to all parties to be an illegal purchase by the corporation of its own capital stock, it was held, that the payee was not a holder in due course because he knew of the illegality and want of consideration, and could not hold the indorsers upon their warranty. Burke v. Smith, 111 Md. 624, 75 Atl. 114.

But knowledge by an indorsee of the incapacity of a prior party (married woman-maker) to contract does not relieve the indorser of liability upon his warranty under this section. Young's Estate, 234 Pa. 287, 83 Atl. 201; First Bank of Notasulga v. Jones (corporation-maker having no power). The N. I. L. was not cited, 156 App. Div. 277, 141 N. Y. Supp. 304.

The warranty of a maker who indorses a note, payable to his own order, is no stronger than his contract as maker, and if that

is void for usury, so is his contract of indorsement. Sabine v. Paine, 166 App. Div. 9, 151 N. Y. Supp. 735, affirmed, 223 N. Y. 401, 119 N. E. 849, S. C. secs. 29, 55, 57.

Where, upon the sale of a note, the purchaser requires the indorsement of the seller, the transaction as between them is a loan, within the meaning of the usury laws. The warranties under this section refer to lawful transactions, and the statute was not intended to withdraw contracts of that nature from the effect and operation of the usury laws. Sedbury v. Duffy, 158 N. C. 432, 74 S. E. 355.

But in those jurisdictions which hold the view, which, it is submitted, is the better one,[1] that the *bona fide* sale of a note at a discount, however large, is not a usurious transaction, although the seller indorses the note, the indorser would be subject to the warranties provided in this section.

An indorser of a check does not warrant the genuineness of the drawer's signature to the drawee who pays it. The drawee is not a holder in due course under section 52, nor a holder under the definition in section 191. The drawee when he accepts a check becomes the guarantor thereof. Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817. The warranty embodied in section 66 does not run in favor of the drawee in respect to the genuineness of the drawer's signature, but only in favor of subsequent holders in due course, and the drawee is not such a holder, nor is the presentation for payment a negotiation. Figures v. Fly, 137 Tenn. 358, 193 S. W. 117, S. C. secs. 14, 62. But the drawee may recover back the money when the drawee was without fault and the indorser was guilty of negligence in not discovering the forgery. Williamsburgh Trust Co. v. Tum Suden, 120 App. Div. 518, 105 N. Y. Supp. 335, S. C. sec. 62. The opinion in this case contains certain dicta to the effect that the indorsement of the payee when presenting the check to the drawee for payment is a warranty or guaranty to the drawee. For a well-founded criticism of these dicta, see 56 Am. Law Reg. (N. S.) (now University of Pennsylvania Law Review), 122. See also, 17 Harvard Law Rev. pp. 581-583. See also, National Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513, S. C. sec. 62; Cherokee Nat. Bank v. Union Trust Co., 33 Okla. 342, 125 Pac. 464, S. C. sec. 62, and other cases cited under section 62.

A check on plaintiff bank which had been raised as to the amount, and the date and name of the payee changed, was indorsed in the substituted name and was deposited in defendant bank which indorsed it, "Received payment through New York Clearing House. Indorsements guaranteed." *Held*, that this indorsement was equivalent to a guaranty of the genuineness of the whole instrument including the indorsement, excepting only the signature of the drawer, and that the defendant was bound to refund the

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[1] Daniels, Negotiable Instruments, sec. 768.

money to the plaintiff. The N. I. L. was not cited. New York Produce Exch. Bank v. Twelfth Ward Bank, 134 App. Div. 953, 119 N. Y. Supp. 988.

The obligation of an indorser on a note, secured by mortgage on land, is a new agreement warranting the instrument as it then appeared on its face, and is not affected by an agreement between the indorser and the maker to accept a deed of the land in satisfaction of the note, although such agreement is known to the indorsee. Fidelity Nat. Bank v. Hosea (Wash.), 160 Pac. 960.

An accommodation indorser, who was one of several payees of a note, is not liable to a transferee when the maker without authority altered the note before negotiation by striking out the name of another payee. The warranty of an indorser does not arise in such a case, his liability being fixed by the condition of the instrument when it leaves his hands. Nor can recovery be had according to the original tenor under section 124, because the indorsement of all the original payees was necessary to give a good title to the transferee and because the note which defendant indorsed never had an inception. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 109, 119-4, 123, 124.

A note secured by mortgage on land in California was executed, delivered and payable in California, but it was indorsed by defendant, the payee, in New Jersey, where, at the time of the indorsement it would have been negotiable under the Negotiable Instruments Law, which had been there adopted, after the making of the note, but before the indorsement. By the law of California there can be only one action for the recovery of any debt or the enforcement of any right secured by a mortgage upon real estate. *Held*, that it was unnecessary to determine whether the note would have been negotiable in New Jersey prior to the adoption of the Negotiable Instruments Law; that notwithstanding the mortgage had been foreclosed and the land sold, the contract of the indorser was governed by sections 63 and 66, N. I. L., and that the defendant could be held for the unpaid balance. Mackintosh v. Gibbs, 79 N. J. Law, 40, 74 Atl. 708 (Supreme Court).

In the Court of Appeals, however,[1] it was held that, by reason of section 195 of the Negotiable Instruments Law, that act did not apply to this note, but that under the former law of New Jersey the note was negotiable, although payable in installments and with attorney's fees, and the judgment was therefore affirmed, the court stating its agreement with the Supreme Court upon the question of the effect of the proceedings in California for the foreclosure of the mortgage. In the syllabus of this case in the Supreme Court, it is stated that the note was "non-negotiable" by the local (California) law, but no reference is made in the opinion in either court to this fact.

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[1] 81 N. J. Law 577, 80 Atl. 554, Ann. Cas. 1912D, 163.

By the law of California at the time, a provision in the note for payment of attorney's fees rendered the note non-negotiable.[1] The case must therefore be considered an authority for the proposition, that although a note is non-negotiable in the jurisdiction where it was made, delivered and payable, yet, if it is negotiable, by the law of the place where it is indorsed, the indorser's rights and liabilities will be those of an indorser of a negotiable note; otherwise, as stated by the Court of Appeals, page 579, the defendant could not have been held, since in New Jersey an action can not be maintained against an indorser of a non-negotiable note.

Sec. 67. Liability of Indorser Where Paper Negotiable By Delivery.

Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.[2]

Sec. 68. Order in Which Indorsers Are Liable.

As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise.[3] Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.[4]

AMES: As joint makers, joint drawers and joint acceptors are liable only jointly, why should joint payees or joint indorsers be liable jointly and severally?

BREWSTER: The provision is a convenience in suing and is in accord with the reformed procedure in most of the states.

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1 Finley v. Pott, 131 Cal. 385; Meyer v. Weber, 133 Cal. 681.

2 "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." B. E. A. s. 56.

3 "Where there are two or more indorsements on a bill, each indorsement is deemed to have been in the order in which it appears on the bill, until the contrary is proved." B. E. A. s. 32 (5).

4 Not in B. E. A.

MCKEEHAN: Professor Ames' inquiry, "Why this distinction," remains unanswered. But would it not be better to widen the scope of the provision and include joint drawers, joint makers and joint acceptors?

Illinois substitutes, "All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable," for the last sentence.

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; Bamford v. Boynton, 200 Mass. 560, 86 N. E. 900; State Bank v. Kahn, 49 Misc. Rep. 500, 98 N. Y. Supp. 858, S. C. sec. 120-4; George v. Bacon, 138 App. Div. 208, 123 N. Y. Supp. 103; Harris v. Jones, 23 N. D. 488, 136 N. W. 1080; Goldman v. Goldberger, 208 Fed. Rep. 877, 126 C. C. A. 35.

This section applies to a note indorsed by several persons, in renewal of a note made and indorsed by the same persons before the passage of the Negotiable Instruments Law. Schneider v. Mueller, 82 N. J. Law 503, 81 Atl. 863; National Newark Banking Co. v. Sweeney, 88 N. J. Law 140, 96 Atl. 86; Trego v. Estate of Cunningham, 267 Ill. 367, 108 N. E. 350.

Parol evidence is admissible to show the agreement between indorsers as to their liability. Hunter v. Harris, 63 Ore. 505, 127 Pac. 786; Noble v. Beeman-Spaulding Co., 65 Ore. 63, 131 Pac. 1006, S. C. secs. 29, 63, 121, 192.

Accommodation indorsers are liable to each other in the inverse order of their indorsements, but if they indorse under an agreement to be equally liable, they are treated as sureties in the adjustment of ultimate rights and liabilities between themselves. Such agreement may be inferred from facts, circumstances and conduct. The N. I. L. was not cited. Plumley v. First Nat. Bank, 76 W. Va. 635, 87 S. E. 94.

Evidence of an oral promise by one accommodation party to a note to save another harmless, is admissible. The N. I. L. was not cited on this point. Handsaker v. Pederson, 71 Wash. 218, 128 Pac. 230, S. C. sec. 125-4.

In an action by one indorser against one of two other indorsers, the defendant may show that the indorsements were for accommodation and that it was orally agreed among the indorsers that his liability was in no event to exceed one-third of the amount at any time due on the note. Shea v. Vahey, 215 Mass. 80, 102 N. E. 119, S. C. *infra,* p. 254.

The agreement to vary the *prima facie* order of liability need not be express but may be inferred from the circumstances. Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157; Trego v. Estate of Cun-

ningham, 267 Ill. 367, 108 N. E. 350; Plumley v. First Nat. Bank, 76 W. Va. 635, 87 S. E. 94.

A promise upon good consideration by the second of two accommodation indorsers to indemnify the first, is not a promise to answer for the debt, default or miscarriage of another within the meaning of the Statute of Frauds, but an original obligation. The evidence admissible under this section may be either written or parol. Wilson v. Hendee, 74 N. J. Law 640, 66 Atl. 413, S. C. secs. 63, 64, 64-1.

The maker of a note who has been obliged to pay it may show by parol evidence that he signed for the accommodation of the payee and subsequent indorsers, and may recover the amount from them. His action is on an implied promise of indemnity and not upon the note. Morgan v. Thompson, 72 N. J. Law 244, 62 Atl. 410.

Since under section 68, joint payees or joint indorsers, who indorse, are deemed to indorse jointly and severally, an action lies against any of them individually, and parol evidence is inadmissible to show that they signed as guarantors only. Hodgens v. Jennings, 148 App. Div. 879, 133 N. Y. Supp. 584.

The mere fact that the indorsers are accommodation indorsers and known to each other to be so, is not sufficient, without proof of an express agreement, to change the rule that prior indorsers are liable *in solido* to subsequent indorsers who have paid a note. *In re* McCord, 174 Fed. 72.

The drawer of an accepted bill is an indorser within the intention of this section, and as between him and an anomalous indorser parol evidence is admissible to show an intention to make the anomalous indorser liable to the drawer-payee. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, S. C. secs. 29, 64-2-3. See comment on this case, *supra*, section 64-2.

Where joint payees indorse, they are joint indorsers. But the old rule requiring notice to be given to each, unless they are partners, is abrogated by this section, and notice to one indorser is enough to charge him, although the others are discharged. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350, S. C. secs. 66, 107, 152, 184.

This section, together with sections 89, 90 and 107, change the law so that one of two joint indorsers can not escape liability because proper notice of dishonor was not given to his joint indorser. Eaves v. Keeton (Mo. App.), 193 S. W. 629, S. C. secs. 63, 118.

A surety indorser who pays the note can not recover contribution from other indorsing sureties without showing presentment and notice of dishonor. Bennett v. Kistler, 163 N. Y. Supp. 555, S. C. sec. 63.

Defendant indorsed a note before delivery to the payee for the accommodation of the maker. Thereafter plaintiff, without the knowledge of defendant, and to secure the discount of the note for the maker, also indorsed the note, and at maturity paid it.

Held, that plaintiff could recover the full amount from defendant. Cohn v. Hitt, 133 Tenn. 466, 182 S. W. 235.

The plaintiff, her son, and the defendant were stockholders and officers in a corporation which gave its note for a loan. The note was indorsed by these three, as officers of the corporation and as individuals, the plaintiff signing last. She paid the note at maturity and sued the defendant as a prior indorser. *Held,* that, in the absence of other evidence to the contrary, the common interest of the indorsers in the corporation overcame the presumption that they were liable in the order in which they signed, and the plaintiff is entitled to contribution only to the extent of one-third the amount of the note. Strasburger v. Meyer-Strasburger Co., 167 App. Div. 198, 152 N. Y. Supp. 757. See also, Trego v. Estate of Cunningham, 267 Ill. 367, 108 N. E. 350, *supra,* p. 252.

Defendant and plaintiff, in the order named, were indorsers on a note given by a corporation in which both were interested. The note was renewed several times, plaintiff being the first indorser on the renewals, the last of which he was compelled to pay in part, and he brought an action to recover the amount from defendant, alleging an agreement by defendant, when the first note was given, to pay it personally. There was evidence tending to support such allegation, and plaintiff testified that when he indorsed the renewal notes he did not know that the order of the indorsements had any legal significance, while it appeared that defendant did know such fact. *Held,* that the evidence was sufficient to require the submission of the case to the jury, as it would have justified a finding that the agreement of defendant to pay the original note impliedly extended to the renewals. Goldman v. Goldberger, 208 Fed. 877, 126 C. C. A. 35.

A payee, who has been compelled (by a judgment) to pay a note which he has indorsed, can not enforce reimbursement from a subsequent indorser, when, upon demurrer to the declaration, there is nothing to show that the indorsers, as between or among themselves "have agreed otherwise" than to be liable in the order in which they indorsed. A declaration by a prior indorser, who has paid a note and sues a subsequent indorser is demurrable, if it fails to aver that they agreed to be liable otherwise than in the order in which they indorsed. Lynch v. Loftin, 153 N. C. 270, 69 S. E. 143.

A promissory note was payable to the order of the maker and indorsed in blank by him and by several accommodation indorsers, who orally agreed among themselves as to the proportions for which they should be liable. One of the accommodation indorsers paid the entire amount due on the note, and wrote above the indorsements thereon the words: "Pay to the order of" an agent of such indorser. *Semble,* that an action in the name of the agent against another of the indorsers can not be maintained upon the note, the remedy of such indorser being by action upon the oral agreement of the indorsers for contribution. Shea v. Vahey, 215 Mass. 80, 102 N. E. 119, S. C. *supra,* p. 252.

A controversy between two indorsers as to whether one signed for the accommodation of the other, can not be interposed as a defense against the holder, who will be entitled to a judgment against both indorsers. The N. I. L. was not cited. State Bank v. Huffman, 100 Neb. 396, 160 N. W. 115.

Sec. 69. Liability of An Agent or Broker.

Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.[1]

The Illinois Act adds the following:

"Section 69a. Whenever any bill of exchange, drawn or indorsed within this state and payable without this state, is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon, and on bills payable without the United States with or without suit, five per cent. damages in addition."

Parol evidence is not admissible to relieve a broker or other agent whose indorsement brings him within this section. People's Bank v. Baker (Mo. App.), 193 S. W. 632, S. C. sec. 66.

ARTICLE VI.

PRESENTMENT FOR PAYMENT.

Sec. 70. Effect of Want of Demand on Principal Debtor.

Presentment for payment is not necessary in order to charge the person primarily liable on the instru-

[1] Not in B. E. A.

ment;[1] but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.(*a*) But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.(*b*)

The Illinois Act interpolates "except in the case of bank notes" after "instrument" in line three.

The Kansas, New York and Ohio Acts interpolate "and has funds there available for that purpose" after "maturity" in line five.

The Wisconsin Act omits all of the first sentence after the words "on the instrument."

AMES: This section changes the law in a number of states as to certificates of deposit and bank notes, and should be amended to except them.

BREWSTER: The objection does not seem to be practical.

MCKEEHAN: Agrees with Professor Ames because under this section the statute of limitations would begin to run against a certificate of deposit from its date, which is contrary to business custom, and the language of such instruments.

The following form of amendment of this section has been suggested:[2]

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[1] "(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable. (2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day it matures." B. E. A. s. 52 (1) (2).

"Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable." B. E. A. s. 87 (1).

[2] Brannan, Some Necessary Amendments of Negotiable Instruments Law, 26 Harvard Law Rev. 589.

"Presentment for payment is not necessary, except in the case of bank notes and certificates of deposit, in order to charge the person primarily liable on the instrument."

This section as enacted was, of course, intended to apply to the maker of a note and the acceptor of a bill, and its effect upon certificates of deposits and bank notes was evidently overlooked. Under this section as it now is, the Statute of Limitations would begin to run against certificates of deposit and bank notes immediately upon their issue. The absurdity of this result is evident as to bank notes which are intended to circulate indefinitely. As to certificates of deposit, the weight of authority was that they must be presented to charge the bank,[1] while in four states it was held that presentment was not necessary.[2]

No one would deny that a demand is necessary to set the Statute of Limitations running against an ordinary deposit in a bank. The mercantile world regards certificates of deposit in the same way, and by the custom of merchants the holder of such a certificate is a depositor who, like the ordinary depositor, may leave the money in the bank indefinitely without being barred by the statute."

Sykes v. Krum, 49 Colo. 560, 113 Pac. 1003, S. C. sec. 89; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, S. C. sec. 89; Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093, S. C. sec 73; Dewees v Middle States C. & I. Co., 248 Pa. 202, 93 Atl. 958; Hillman v. Stanley, 56 Wash. 320, 105 Pac. 816, S. C. sec. 27; Schoenwetter v. Schoenwetter, 164 Wis. 131, 159 N. W. 737; *In re* Swift, 106 Fed. Rep. 65, S. C. sec. 82-3.

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[1] Hillsinger v. Georgia Railroad Bank [1899], 108 Ga. 357, 33 S. E. 985; Brown v. McElroy [1876], 52 Ind. 404; Elliott v. State Bank [1905], 128 Ia. 275, 103 N. W. 777, overruling Mereness v. First Nat. Bank [1900], 112 Iowa 11, 83 N. W. 711; Fells Point Savings Institution v. Weedon [1862], 18 Md. 320; Shute v. Pacific Nat. Bank [1884], 136 Mass. 487; Howell v. Adams [1877], 68 N. Y. 314; Cottle v. Marine Bank [1901], 166 N. Y. 53, 58, 59 N. E. 736, 737. So also as to certificates of deposit issued by an individual, Smiley v. Fry [1885], 100 N. Y. 262, 3 N. E. 186; Bank of Commerce v. Harrison [1901], 11 N. M. 50, 66 Pac. 460; McGough v. Jamison [1884], 107 Pa. St. 336; Tobin v. McKinney [1901], 15 S. D. 257, 88 N. W. 572; Bellows Falls Bank v. Rutland County Bank [1867], 40 Vt. 377; Riddle v. First National Bank [1886], 27 Fed. 503.

[2] Brummagin v. Tallant [1896], 29 Cal. 503; Tripp v. Curtenius [1877], 36 Mich. 494; Mitchell v. Easton [1877], 37 Minn. 335, 33 N. W. 910. But the right to sue a bank on a general deposit does not accrue nor the Statute of Limitations begin to run until demand of payment, unless demand is in some way dispensed with, Branch v. Dawson [1885], 33 Minn. 399, 23 N. W. 552; Curran v. Witter [1887], 68 Wis. 16, 31 N. W. 705.

(*a*) Presentment for payment is unnecessary to charge the person primarily liable whether the instrument is payable on time or on demand, although it is made payable at a particular place. Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540; Hyman v. Doyle, 53 Misc. Rep. 597, 103 N. Y. Supp. 778; Dominion Trust Co. v. Hildner, 243 Pa. 253, 90 Atl. 69, S. C. sec. 30.

A demand note, even though drawing interest, is, as between the original parties, due at the time of delivery and needs no presentment or demand. Shuman v. Citizens' Bank, 27 N. D. 599, 147 N. W. 388, L. R. A. 1915A, 728.

Since a note payable on demand is due and payable from the time of its delivery without demand, a bank holding a demand note may apply to its payment the deposit of the maker. *Ib.*

Where a note sued on is payable at a particular place, such fact is material and must be averred in the declaration, otherwise the note is not admissible in evidence. Filing the note with the declaration does not cure the defect. Shaw v. Newton, 5 Del. 19, 90 Atl. 465.

If money for the payment of a note awaits the holder at the time and place for payment, this is the equivalent of a tender under section 70. If the holder of a note does not present his note for payment where payment is tendered, he does not thereby forfeit his debt, but only the cost of collecting it elsewhere. Moore v. Alton, 196 Ala. 158, 70 So. 681.

The maker of a note, payable at a bank, is not discharged by failure to present it to the bank, even though he had sufficient funds there to pay it and the bank subsequently failed. Binghampton Pharmacy v. First Nat. Bank, 131 Tenn. 711, 176 S. W. 1038. See section 81, *infra*, pp. 280, 281 for criticism of this case.

Although a note is payable at a special place, presentment at such place is not necessary to charge the maker but, merely to relieve him from liability for damages, if he is ready to pay there and there is no one there to receive the money. So it is no defense that the collateral was not there tendered. It is sufficient to tender the collateral at the trial. Gordon v. Benguiat, 95 Misc. Rep. 132, 159 N. Y. Supp. 1.

It is for the maker of a note payable at a specified place to aver and prove that he was ready and offered at the time and place to pay it. No demand by the holder need be averred or proved. Florence Oil Co. v. First Nat. Bank, 38 Colo. 119, 88 Pac. 182.

Where a note names no place of payment, it is generally payable at the maker's residence or place of business. Where a note, payable on or before a given date with the option to the holder to declare the whole due on default as to monthly installments of interest, did not fix a place of payment and the maker had a place of business in the city where the note was payable, and was able and willing to make interest payments as they matured, the holder could not declare the note due for failure to pay installments of interest, without presentment, demand and refusal at the maker's

place of business, although the note may not be, under section 70, N. I. L., "By its terms payable at a special place." Bardsley v. Washington Mill Co., 54 Wash. 553, 103 Pac. 822.

(*b*) Presentment and notice of dishonor are necessary to charge the indorser of a note containing an option, which has been exercised, to declare the whole sum due for non-payment of interest. Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113, S. C. secs. 82-3, 109; Bradshaw v. Chaffee, 90 Wash. 404, 156 Pac. 388. *Cf.*, Hopkins v. Merrill, *infra*, section 89.

That a demand note bears interest does not make it any the less a demand note, but this fact may be considered in determining whether the parties expected an immediate or early demand. Murray v. Third Nat. Bank, 234 Fed. Rep. 481, 148 C. C. A. 247, S. C. secs. 63, 64, 80.

A mortgage was given by the maker of a note to an indorser to secure him on account of his indorsement. *Held*, that he was nevertheless not chargeable without presentment and notice, and it not appearing that he had been so charged, the holder to whom the mortgage had been assigned could not foreclose it. The N. I. L. was not cited. First Nat. Bank v. Baker, 163 App. Div. 72, 148 N. Y. Supp. 372.

The holder of a note, pledged as collateral, failed to make presentment to the maker at maturity, whereby a solvent indorser was discharged. *Held*, that this was a good defense to an action on the principal debt. State Bank of Clinton v. Parkhurst, 155 Ill. App. 101.

Where the president and directors gave a note to the bank, the president signing as maker, and the others as indorsers, but the understanding was that they should be liable collectively, presentment for payment was not necessary to charge the indorsers. Union Bank v. Sullivan, 214 N. Y. 332, 108 N. E. 558, S. C. secs. 25, 66, 123.

SCOTLAND—

By virtue of section 52(2)[1] failure to present to the maker on the day of maturity a note made payable at a particular place does not discharge the maker. Presentment at the particular place on a subsequent day is sufficient. Gordon v. Kerr, 25 Sess. Cas. 570.

Sec. 71. Presentment Where Instrument is not Payable on Demand and Where Payable on Demand.

Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be

[1] See *supra*, p. 256, n. 1.

made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.[1]

The Nebraska Act omits all of the section after the words "reasonable time after its issue."

The New Hampshire Act adds the following: "Upon a promissory note payable on demand, a demand made at the expiration of sixty days from the date thereof, without grace, or at any time within that term, shall be deemed to be made within a reasonable time; and any act, neglect or other thing, which by the provisions of this act is deemed equivalent to a presentment and demand on a note payable at a fixed time, or which would dispense with such presentment and demand, if it occurs at or within the sixty days, shall be a dishonor thereof, and shall authorize the holder of the note to give notice of the dishonor to the indorser as upon a presentment to the promisor, and his neglect or refusal to pay the same. No presentment of the note to the promisor and demand for payment shall charge the indorser unless made on or before the last day of the sixty days."

In South Dakota the maturity of demand instruments is fixed by a new section, see *infra*, section 193, p. 412.

In Vermont the words, "the last negotiation thereof," are omitted and the words, "its issue in order to charge the drawer," are substituted.

Hampton v. Miller, 78 Conn. 267, 61 Atl. 952; German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3; Robinson v. Holmes, 57 Ore. 5, 109 Pac. 754, S. C. sec. 89; American Nat. Bank. v. Nat. Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96, 97.

Section 71 has abrogated the former distinction between interest-bearing demand bills and notes and those payable without interest, with reference to the time of presentment to charge an indorser. Under this section and section 193, the burden is on

[1] Where the bill is payable on demand, then subject to the provisions of this Act, presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable." B. E. A. s. 45 (2). "Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. It is be not so presented, the indorser is discharged." B. E. A. s. 86 (1).

the holder to prove presentment within a reasonable time, and the defendant indorser need not plead failure to make due presentment. Where the facts are ascertained and not in dispute, reasonable time is a question of law.[1] Circumstances held to make three and a half years an unreasonable time. Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020. The case of Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987, S. C. sec. 193 is in accord as to the burden of proof. See also, First Nat. Bank v. Star Watch Case Co., 187 Mich. 224, 153 N. W. 722, S. C. sec. 105, that burden of proof of notice of dishonor is on the holder.

The case of German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142, which held that this section is in effect a statute of limitations, and that the burden was upon the indorser of a demand note to plead and prove that presentment was unreasonably delayed, must be considered as overruled by Commercial Nat. Bank v. Zimmerman, *supra.*

Unreasonable delay in the presentment of a check will discharge the indorser whether such delay is a cause of loss to him or not. Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447, S. C. secs. 23, 89, 186.

A certificate of deposit payable on demand must be presented for payment within a reasonable time after its issue in order to charge an indorser. *Semble*, this is true, even though it contains on the back a certificate that interest at a certain rate will be paid on the deposit, if left undrawn for six months. Anderson v. First Nat. Bank, 144 Iowa, 251, 122 N. W. 918.

A demand note payable to the order of the maker, and drawing interest, was indorsed by a third person for the maker's accommodation and was negotiated ten days after its date. *Held*, that presentment for payment within ten months was sufficient to hold the indorser. Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383, S. C. secs. 7-1, 73.

In an action on a note, where its presentment in a reasonable time is in issue, evidence that it was the custom of banks to hold demand paper with an indorser for years, if the parties were good and the bank did not require the fund, is admissible. State of New York Nat. Bank v. Kennedy, 145 App. Div. 669, 130 N. Y. Supp. 412.

A check need not be forwarded for collection in a direct line as a bird might fly, but by the usual commercial route. Sublette Exch. Bank v. Fitzgerald, 168 Ill. App. 240.

"The usage of trade or business includes the usage of banks relating to presentment of checks for payment. It is sufficient diligence to charge an indorser if a check on the bank in another place is forwarded through various banks for collection in accordance with the regular usage of the business, although presentment

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[1] Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20; Zaloon v. Gamin, 72 Misc. 36, 129 N. Y. Supp. 85, S. C. sec. 186; First Nat. Bank v. Korn (Mo. App), 179 S. W. 721, S. C. secs. 63, 155. See also cases under sec. 193, *infra.*

might have been more promptly made if a more direct course had been taken." Plover Savings Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29, S. C. petition for rehearing overruled, 113 N. W. 476. See also, Citizens Bank v. First Nat. Bank, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, S. C. sec. 186.

This section changes the laws as to bills of exchange payable on demand, and under this section only the time intervening between the last negotiation and the presentment need be considered. Hence, where a draft was sold by a Wisconsin bank to defendant (payee) on June 10th, and he indorsed and sent it on June 16th to A at Spokane while he was on his way to San Francisco, and A upon arrival there on July 14th sold the draft to plaintiff bank, which sent it at once to a Chicago bank, which presented it July 18th to the drawee bank there, which refused payment, and due protest was then made, it was held that the delay between the date and the negotiation of the draft to plaintiff bank was immaterial, and that the draft was presented in time to hold the defendant on his indorsement. Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, S. C. sec. 72-2.

In Plover Savings Bank v. Moodie, *supra*, the court said: "Within reasonable limits it may be said that no matter how long they (checks) remain outstanding, so long as one negotiation properly follows another and the checks are in fact in circulation, the statute requires us to hold that the indorser is not legally prejudiced by the consequent delay in their presentment for payment." What is meant by "reasonable limits" is not clear, since the statute by its terms and as construed in the foregoing cases, puts no limit on the length of the time that presentment for payment may be delayed, provided only that it is made within a reasonable time after the last negotiation of a bill of exchange payable on demand. Section 71 must apply equally well to a check drawn and delivered in the place where the drawee bank is located and therefore while it has always been the rule that in such case the check must be presented before the close of banking hours the next business day or the indorsers will be absolutely discharged and the drawer to the extent of loss caused by the delay.[1] Yet under this section an indorsee of a check drawn and payable in the place where the drawee bank is located may hold it indefinitely, and if he subsequently negotiates it, so that his indorsee may present it for payment within a reasonable time from such last negotiation and before the Statute of Limitations has run, the indorsers will not be discharged at all and the drawer will not be discharged except to the extent of loss caused to him by the delay.

It has, however, been held without discussion, and without reference to the foregoing cases, that the meaning of sections 30 and 71 is not that a check may be sent for collection in a

[1]Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 120 Am. St. Rep. 565, S. C. sec. 186; Carroll v. Sweet, 128 N. Y. 19; Mohawk Bank v. Broderick, 13 Wend. 133, and other cases cited under sec. 186 *infra*.

roundabout way through any banks, and that a reasonable time for its presentment does not begin after the last time it is sent on for collection, and that therefore an indorser is discharged after a reasonable time after the check is issued. First Nat. Bank of Chadwick v. Mackey, 157 Ill. App. 408.

The principle established in Columbian Banking Co. v. Bowen and Plover Savings Bank v. Moodie, *supra*, p. 262, would seem to continue the liability of the drawer and indorsers of a bill payable on demand for an indefinite time, limited only by the Statute of Limitations, provided only that the bill is presented for payment within a reasonable time after its last negotiation, no matter how long this may be after the drawing or indorsement.

Moreover, by the combined effects of sections 185 and 186 if a check had not been presented within a reasonable time *after its issue* and the drawee bank had failed in the meantime, the drawer would be discharged to the extent of the loss caused by such delay.

Whereas, if said presentment was within a reasonable time after the last negotiation of the check, the indorser would be held without any recourse against the drawer except as to such dividend as the insolvent bank might be able to pay, a most unjust result. These unfortunate consequences might have been avoided by adopting the corresponding provision of the B. E. A. (section 45(2) *supra*, p. 260, n. 1), under which the drawer is discharged unless presentment is made within a reasonable time after the issue of the bill, and the indorser unless it is presented within a reasonable time after his indorsement.

It is submitted that section 71 is defective in another respect. The last paragraph provides that an instrument payable on demand must be presented within a reasonable time after its issue. This is all right as to the drawer of a bill or the maker of a note, but not as to an indorser. An overdue time note, both by the common law [1] and by the statute [2] is payable on demand and as against an indorser of such an overdue note presentment was required within a reasonable time from the indorsement, not from the issue of the note. Again a note originally payable on demand may be indorsed more than a reasonable time after its issue, in which case it would be manifestly impossible for the indorser to present the note within a reasonable time after its issue. Is the indorser therefore to be discharged? The language of section 71 seems to necessitate this result. In Anderson v. First Nat. Bank, 144 Iowa, 251, 122 N. W. 918, *supra*, p. 261, it was held that under this section a certificate of deposit payable on demand must be presented within a reasonable time after its issue in order to charge an indorser. It has been suggested,[3] in order to cure both the above-mentioned defects, that the last paragraph of section 71 be amended so as to read:

[1] Colt v. Barnard, 18 Pickering 260; Wilby v. Bassenhorst, 45 Ohio St. 333; Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20, *infra*, p. 264.

[2] Sec. 7-2.

[3] Brannan, Some Necessary Amendments to the Negotiable Instruments Law, where the subject is more fully discussed.

"Where it is payable on demand, presentment must be made within a reasonable time *after its indorsement in order to charge the indorser, and in case of bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer.*"

A note, indorsed after maturity, is payable on demand (section 7) and must be presented within a reasonable time to charge the indorser. Reasonable time is generally a question of fact, and on this question evidence of what took place at the time of the indorsement is admissible. Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20.

The defendant was assistant cashier of a bank and was also city treasurer and received from the city clerk a check drawn upon the bank payable to his order as city treasurer. The defendant was working in the bank and knew that it was in a failing condition. The bank failed to open its doors on the next secular day. *Held,* that the defendant was negligent in failing to present the check on the day he received it and was liable to the city for the amount of the check. Babcock v. Rocky Ford, 25 Colo. App. 312, 137 Pac. 899.

The president and treasurer of a corporation, who indorses its note, payable on demand, is entitled to presentment within a reasonable time and notice of non-payment to fix his liability. The insolvency of the maker of a note does not excuse presentment and notice of dishonor. Grandison v. Robertson, 231 Fed. Rep. 785, 145 C. C. A. 605.

Defendant was indorser on a demand note given to a loan association by whose by-laws the note was payable in weekly installments, and, if the maker became four weeks in arrears, he would be in default and the indorsers become liable for the balance due. Defendant was not informed of this by-law. The maker paid several installments and made default for more than four weeks, which expired on Tuesday. On Saturday following, notice was given to defendant. *Held,* that demand should have been made within a reasonable time after the date of the note and due notice given to the indorser. That this rule was not changed by the by-law and the evidence justified a finding of the trial judge that demand was not made within a reasonable time. Hill Savings, etc., Club. v. Barnowitz (N. J.), 97 Atl. 28.

Sec. 72. What Constitutes a Sufficient Presentment.

Presentment for payment, to be sufficient, must be made,—

1. By the holder, or by some person authorized to receive payment on his behalf;(*a*)
2. At a reasonable hour on a business day;(*b*)
3. At a proper place as herein defined;

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.[1]

Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 109 N. E. 179, S. C. secs. 119, 186; German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. sec. 74; Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093, S. C. sec. 73.

(*a*) Presentation of a promissory note for payment by a bank having it for collection is sufficient. Fowler Paper Co. v. Best Jones, etc., Co., 183 Ill. App. 310.

(*b*) This provision has reference to the general custom at the place of the particular transaction. So when presentment was made to a Chicago bank between 3 and 6 o'clock and the business day of banks continued after the closing of clearing-house transactions so as to enable banks holding paper for collection to present such as had been refused recognition in the clearings, such presentment was within reasonable hours on a business day. Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, S. C. sec. 71.

In case of presentment in a foreign jurisdiction what constitutes reasonable hours of a business day there is a matter of proof. *Ib.*

A notarial certificate of protest showing a due presentment raises a presumption that presentment was made at a proper time. *Ib.*

Sec. 73. Place of Presentment.

Presentment for payment is made at the proper place,—

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

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1 "Either to the person designated by the bill as payee or to some person authorized to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found." B. E. A. s. 45 (3).

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;[1]
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Ryan v. State, 60 Fla. 25, 53 S. E. 448; Smith v. Shippers' Oil Co., 120 La. 640, 45 So. 533; Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 109 N. E. 179, S. C. secs. 119, 186; Myers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034, S. C. sec. 82-3; German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3.

A note payable at a bank is properly presented for payment at the bank, although the bank is in the hands of a receiver and closed. Presentment need not be made to the receiver personally, he having no authority to pay. Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383, S. C. secs. 7-1, 71.

Where a note is payable at a certain store, presentment for payment at such store to a person connected therewith is sufficient, and no personal demand on the maker is necessary. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093.

Possession by the payee bank of a note payable at its office constitutes a sufficient presentment and demand. Norwood Nat. Bank v. Piedmont Co. (S. C.), 91 S. E. 866, S. C. sec. 64.

A note was payable at a bank. The complaint alleged that notice of presentment, demand, non-payment and protest was waived. Defendant denied the allegations of the complaint. *Held*, that waiver of notice of dishonor does not include waiver of presentment and that plaintiff could not recover in the absence of proof of presentment for payment. Bear v. Hoffman, 150 App. Div. 475, 135 N. Y. Supp. 28.

Where a note is payable at a designated branch of a trust company, presentation at the principal office of the company on the date of maturity and at the branch after banking hours on the day following is not sufficient as against an indorser. Ironclad Mfg. Co. v. Sackin, 129 App. Div. 555, 114 N. Y. Supp. 43.

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[1] "Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known." B. E. A. s. 45 (4) (c).

Where a note, dated Hornell, N. Y., was drawn payable at "The First National Bank," presentment for payment at the First National Bank of Hornell, N. Y., is sufficient. Finch v. Calkins, 183 Mich. 298, 149 N. W. 1037, S. C. sec. 46.

Sec. 74. Instrument Must Be Exhibited.

The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it

Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3.

In an action on a demand note against the maker, it is not necessary to allege a demand for payment or that the note was exhibited to the maker. The note was due at the time of delivery, and demand is presumed to have been then made, and this is true even though the note bears interest. Church v. Stevens, 56 Misc. Rep. 572, 107 N. Y. Supp. 310.

Where notes were, at maturity, not at the place provided for payment, but were in a bank, and so were not only not in readiness for exhibition and surrender, but could not have been surrendered if payment had been offered, there was no legal presentment for payment at the time and place specified in the note and no waiver being pleaded or claimed, the indorser was discharged. Greco v. Lo Monte, 162 N. Y. Supp. 982.

Under the Negotiable Instruments Law, which by section 70 makes presentment of a note necessary to charge the indorsers, and by section 74 requires the notes to be exhibited to the person from whom payment is demanded, a mere informal talk asking payment of a note, not accompanied with a presentment of it or intended as a formal presentment and demand, is not sufficient to put the note in dishonor. State of New York Nat. Bank v. Kennedy, 145 App. Div. 669, 130 N. Y. Supp. 412.

A note was made payable at the home of the maker and at maturity he was called up by telephone and asked what he was going to do about it, and answered that he could not pay, and was told that the note would be protested. *Held*, that the right of the maker to the exhibition of the note was not waived, and that the demand over the telephone was not a sufficient presentment to charge the indorser. Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656. The court made no reference to section 74, but cited only sections 66, 70, 72 and 73.

Even if it be assumed that the loss of a note sued on excuses failure to comply with section 74, it was nevertheless the duty of the plaintiffs to give due notice of dishonor, in order to charge the indorser. Klots v. Silver, 127 N. Y. Supp. 1090.

Since formal demand is required only in order to charge the parties secondarily liable, it follows that any reasonable request to pay a demand note with a clause for attorney's fees, is sufficient to put the maker in default if he fails to discharge the obligation. The maker waives exhibition of the note by not asking for it and refusing payment on the ground that he did not have the money and needed the sum to support his family. Hodges v. Blaylock, 82 Ore. 179, 161 Pac. 396, S. C. sec. 2-5.

Sec. 75. Presentment Where Instrument Payable at Bank.

Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.[1]

The Nebraska Act omits everything after the words "banking hours" in line two.

Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, S. C. secs. 71, 72; Columbia-Knickerbocker Trust Co. v. Miller, 156 App. Div. 810, 215 N. Y. 191, S. C. secs. 119, 186.

The person to make payment has until the close of banking hours of the bank where the instrument is made payable in which to pay it, and if before the close of such hours he deposits money enough to pay it, a demand earlier in the day is premature. German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242.

A promissory note payable at a bank and there presented on the day of maturity will be presumed to have been presented during business hours, where there is no evidence to the contrary, and it need not remain at the bank during all the day of maturity. Archuleta v. Johnston, 53 Colo. 393, 127 Pac. 134, S. C. sec. 108.

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[1] Not in B. E. A.

It is sufficient presentment of a note payable at a bank if it is actually in the bank at maturity, ready to be delivered on payment. Section 87 was cited but the court must have had section 75 in mind. De La Vergne v. Globe Printing Co., 27 Colo. App. 308, 148 Pac. 923, S. C. secs. 104-2, 115-2; Doherty v. First Nat. Bank, 170 Ky. 810, 186 S. W. 937, S. C. secs. 96, 100, 102, 109.

Sec. 76. Presentment Where Principal Debtor is Dead.

Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

Calling two or three times at the banking office of the administrator of a deceased maker, and again seeking him at a railroad station near the seat of his other business interests at a time when he might be expected to be there, warrants a finding of reasonable diligence to present a note for payment Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 89, 96.

Sec. 77. Presentment to Persons Liable as Partners.

Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.[1]

Sec. 78. Presentment to Joint Debtors.

Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Under section 78, an informal demand on one of two joint makers is not a basis for charging indorsers. State of New York Nat. Bank v. Kennedy, 145 App. Div. 669, 130 N. Y. Supp. 412.

[1] Not in B. E. A., except inferentially from s. 45 (6), which is the same as N. I. L. s. 78.

Sec. 79. When Presentment Not Required to Charge the Drawer.

Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

West Branch Bank v. Haines, 135 Iowa, 313, 112 N. W. 552; *In re Swift,* 106 Fed. Rep. 65, S. C. secs. 64-1, 82-3.

Presentment is not required to charge the drawer of a check upon which payment has been stopped. The N. I. L. was not cited. Sibree v. Thomas, 166 Ill. App. 422; Usher v. A. I. Tucker Co., 217 Mass. 441, 105 N. E. 360, L. R. A. 1916F, 826, S. C. sec. 25.

That the drawer of a bill has no funds in the hands of the drawee will not excuse failure to make presentment and notice of non-payment, particularly when provision has been made for payment of any bill drawn by the drawer on the drawee. Simonoff v. Granite City Nat. Bank, 279 Ill. 246, 116 N. E. 636, S. C. secs. 82, 109, 152.

Sec. 80. When Presentment Not Required to Charge the Indorser.

Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

The Illinois Act omits everything after the words "for his accommodation."

Beech v. Roberts, 191 Mo. App. 243, 177 S. W. 1062; McDonald v. Luckenbach, 170 Fed. Rep. 434, 95 C. C. A. 604, S. C. sec. 63.

It is not necessary under this section and section 115, that a loan for which notes were given should have been made for the sole accommodation of an indorser. It is enough if it was only partly for his benefit. Bergen v. Trimble (Md.), 101 Atl. 137.

A president made and the directors and stockholders of a bank indorsed a note, payable to the bank, instead of charging off certain listed assets which were worthless, agreeing among them-

selves that all the signers should be liable, not separately, but collectively. *Held,* (1) that the note was supported by a sufficient consideration, and (2) that presentment to the maker for payment was not necessary to charge the indorsers. Union Bank of Brooklyn v. Sullivan, 214 N. Y. 332, 108 N. E. 558, S. C. secs. 25, S. C. secs. 63, 64, 70.

The president of the X bank, upon the increase of the capital stock, took the unsubscribed amount, made a demand note for the amount to his own order, indorsed the note and the directors also indorsed it. The note was negotiated to the plaintiff bank, the proceeds paid to the X bank, the stock issued to the president, and pledged to plaintiff bank as security for the note. The president testified that the purchase of the stock was his individual transaction and so did the directors. There was no evidence to the contrary. *Held,* that the directors were not primarily liable, and the fact that they might be benefited by an increase in the value of the stock by the completion of the subscription for the increased issue, did not make the note one for their accommodation so as to dispense with presentment for payment in order to charge them. Murray v. Third Nat. Bk., 234 Fed. Rep. 481, 148 C. C. A. 247, S. C. secs. 63, 64, 70.

Sec. 81. When Delay in Making Presentment is Excused.

Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925, S. C. sec. 186.

Sec. 82. When Presentment May Be Dispensed With.

Presentment for payment is dispensed with:—

1. Where after the exercise of reasonable diligence presentment as required by this act can not be made;[1]

[1] The English Act adds: "The fact that the holder has reason to believe that the bill will, on presentment, be dishonored does not dispense with the necessity for presentment." B. E. A. s. 46 (2) (a).

2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.(*a*)

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; Jordan v. Reed, 77 N. J. Law, 584, 71 Atl. 280, S. C. sec. 115; Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89, 96; Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. secs. 74; Bear v. Hoffman, 150 App. Div. 475, 135 N. Y. Supp. 28, S. C. sec. 73.

(*a*) The facts excusing presentment or failure to give notice of dishonor or a waiver thereof must be specially pleaded. Proof thereof is not otherwise admissible. Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113, S. C. secs. 70, 109.

Presentment of a bill is waived by any acts or conduct of the drawer calculated to lead the holder to believe that presentment is waived or to mislead or prevent him from treating the bill as he otherwise would. In this case the drawer promised from time to time to pay the bill, making no objection on the ground that the bill had not been presented to the drawee. Sections 109 and 111 were cited, but not section 82. Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 N. E. 636, S. C. secs. 79, 109, 152.

To bind the indorser, his waiver must be with knowledge of the facts which release him, but ignorance as to their legal effect will not relieve him in the absence of fraud. Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455, S. C. sec. 64-1. This case was again heard by the Supreme Judicial Court upon exceptions taken at a second trial, when it was further held that while a written waiver of demand made without limitation after the time for demand has expired can not, as a general rule, be limited by oral evidence, yet such evidence is competent to show fraud, mistake, or circumstances to aid the court to ascertain the construction of the agreement. So where on a demand note an indorsement was made more than sixty days after its date (see Merritt v. Jackson, *infra*, section 193), waiving "demand, notice, and protest," evidence was admissible to show whether this waiver referred to a protest within said sixty days or to a further protest, and that it was for the jury to say upon the evidence which of these two protests was the subject matter of the agreement, and that their finding for the indorser was conclusive. Toole v. Crafts, 196 Mass. 397, 82 N. E. 22.

Defendant, the president of a corporation, indorsed its note. Before maturity, the maker was adjudged a bankrupt partly upon the written admission of defendant of its inability to pay its debts with a willingness that it be adjudged a bankrupt. *Held*, that defendant had waived presentment and notice of dishonor. J. W. O'Bannon Co. v. Curran, 129 App. Div. 90, 113 N. Y. Supp. 359.

Where the indorsers of a note, payable at a bank, had assured the holder that it could not be paid at maturity and knew that the maker, a corporation, had not the money to pay it, they were not discharged by failure to present the note for payment. Bessenger v. Wenzel, 161 Mich. 61, 125 N. W. 750, 27 L. R. A. (N. S.) 516.

A firm made a note which was indorsed by one of the partners prior to its delivery. Shortly before maturity of the note, the indorser, during a consultation with the holder regarding a general assignment of the firm and the partners, which was thereafter made as a result of the conference, told the holder that neither the firm nor he could pay the note at maturity, and the holder therefore made no presentment for payment and gave no notice of non-payment. *Held,* that both by the law merchant and under the statute there was an implied waiver of presentment and that under section 115-2 notice of dishonor was not required. *In re* Swift, 106 Fed. Rep. 65, S. C. sec. 64-1.

Evidence that defendant, who was an officer of the corporation-maker, executed a note, and who was liable thereon as indorser, stated that if the holder would wait until 4 o'clock of the day on which the note matured, he would come to the bank and pay it, was held to be sufficient to require the submission to the jury of the question of waiver of protest and notice thereof. The N. I. L. was not cited on this point. Second National Bank v. Smith, 118 Wis. 18, 94 N. W. 664, S. C. sec. 96.

Where defendant-indorser assured the holder, before maturity of the note, that a note for the same amount, with his indorsement, would be given in renewal, such assurance, if relied on by the holder, constituted a waiver of demand and notice. The N. I L. was not cited. Sweetser v. Jordan, 216 Mass. 350, 103 N. E. 905.

The defendant-indorser agreed with the plaintiff-indorsee to look after the collection of the note and prepared a notice to the maker to pay the note, which the plaintiff signed and sent to the maker. On the day of maturity the maker telephoned the plaintiff that he could not then pay the note. The plaintiff then telephoned the defendant who consented that the maker should be given further time. *Held,* that defendant had waived presentment and notice of dishonor. Moll v. Roth Co., 77 Ore. 593, 152 Pac. 235.

Upon suit by a payee against an anomalous indorser, it appeared that the note was in the actual possession of the indorser from the time it was made until its maturity. This obviated the necessity of presentment and notice of non-payment to the indorser. The indorser having the note in his possession, should have presented it for payment at maturity. Glesson v. Lichty, 62 Wash. 656, 114 Pac. 518.

Evidence of assurances by the indorser to the indorsee when indorsing and delivering a note, that the former would be responsible for principal and interest when due, and would look after the collection of the note and pay interest when it became due, is

competent to show a waiver by declarations of the indorser calculated to mislead the indorsee and induce him to omit presentment and notice of dishonor. Torbert v. Montague, 38 Colo. 325, 87 Pac. 1145.

Where a note is payable at a bank, presentment and demand at a bank are necessary in the absence of some good and sufficient reason for failing to make presentment there. If the maker of such a note has no funds in the bank when it falls due, demand for payment there is unnecessary. The N. I. L. was not cited on this point. Myers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034, *semble,* S. C. sec. 64.

Before maturity of a note, the holder informed defendant, an indorser, that the maker had denied liability and that the holder would look to defendant for payment. Defendant said that he was liable, but did not have the money to pay, that, if plaintiff would see the maker, defendant would pay, if plaintiff should fail to make the money out of the maker. Plaintiff was induced by these statements to omit presentment and notice of dishonor. *Held,* that defendant had not waived these steps. Worley v. Johnson, 60 Fla. 295, 53 So. 542, 33 L. R. A. 641.

Defendant was an accommodation indorser of a demand note payable to plaintiff and given as security for debts which the maker might contract with plaintiff. Defendant reserved the right to withdraw his indorsement after four months upon payment of such debts to the amount of the note. Within four months plaintiff informed defendant of the amount due him from the maker, and defendant said that he would see the maker and if he did not pay "would go and shut him up." *Held,* these facts did not excuse presentment and notice of dishonor. Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481.

A waiver of "notice of presentment, dishonor and protest" is not a waiver of presentment. Hayward v. Empire State Sugar Co., 105 App. Div. 21, 93 N. Y. Supp. 449, S. C. sec. 109.

ENGLAND—

The drawer, being ignorant that the bill had not been presented for payment, accepted notice of non-payment. *Held,* that he had not waived presentment. Keith v. Burke, 1 Cababe & Ellis, 551.

SCOTLAND—

A bill, which had been indorsed, was not presented for payment at maturity, nor was notice of dishonor given to the indorser. After the bill was due, a payment on account was made by the indorser, under the erroneous belief, as she alleged, that she was not the indorser but a joint acceptor and so liable to pay. In an action for payment of the balance due under the bill. *Held,* that the presumption, arising from the payment on account, that the indorser had waived the statutory requirements, had been rebutted by proof that the payment had been made in error; and that, in consequence of the failure of the holder to observe

these requirements, the indorser was freed from liability. Observations as to the presumptions and the onus of proof with regard to waiver of the statutory requirements. Mactavish's Judicial Factor v. Michael's Trustees [1912], Session Cases, 425.

Sec. 83. When Instrument Dishonored By Non-Payment.

The instrument is dishonored by non-payment when,—

1. It is duly presented for payment and payment is refused or can not be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89, 96; American Nat. Bank v. National Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96, 97.

Sec. 84. Liability of Person Secondarily Liable—When Instrument Dishonored.

Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802, S. C. sec. 74; Bacigalupo v. Parrilli, 112 N. Y. Supp. 1040, S. C. sec. 89; American Nat. Bank v. National Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96, 97; Kennedy v. Thomas [1894], 2 Q. B. 759, S. C. sec. 85.

Under this section an indorser whose liability has become fixed by demand and notice is, as to the holder, a principal-debtor. Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N. E. 465, S. C. sec. 119-1.

After a note has been dishonored at maturity and due notice given to the indorser, he becomes liable to the holder, not as a

surety, but absolutely and independently of the liability of the maker and may set off his liability against a deposit in the holder bank, which has become insolvent, although the note matured subsequent to the bank's insolvency. Carnegie Trust Co. v. Kistler, 89 Misc. Rep. 404, 152 N. Y. Supp. 240. Curtis v. Davison, 215 N. Y. 395, 109 N. E. 481, S. C. secs. 57, 66. The N. I. L. was not cited in these two cases.

Under this section and section 29, the payee of a note may sue an indorser for the accommodation of the maker, although known to be such, before realizing on security obtained from the maker. Miller v. Levitt (Mass.), 115 N. E. 431.

Sec. 85. Time of Maturity.

Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.[1]

In Massachusetts this section was amended (Laws 1899, c. 130), as follows: "On all drafts and bills of exchange made payable within this commonwealth at sight, three days of grace shall be allowed, unless there is an express stipulation therefor to the contrary."

The New Hampshire Act makes the same provision.

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[1] "Were a bill is not payable on demand, the day on which it falls due is determined as follows: (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day. (b) When the last day of grace is a bank holiday (other than Christman Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day." B. E. A. s. 14 (1).

In Rhode Island, by amendment in 1909, the words "except sight drafts" were interpolated after the words "every negotiable instrument."

The North Carolina Act (Revisal of 1908, sections 2234, 2235), provides that every negotiable instrument is payable at the time fixed therein without grace except that "all bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect, and not otherwise, shall be entitled to days of grace as the same are allowed by the customs of merchants in foreign bills of exchange, payable at the expiration of a certain period after date on sight; provided, that no days of grace shall be allowed on any bill of exchange, promissory note or draft payable on demand."

The Arizona, Kentucky and Wisconsin Acts omit altogether the third sentence beginning "Instruments falling due," and in Vermont all of the third sentence before the words "instruments payable on demand" is omitted.

In North Carolina, said third sentence was stricken out by amendment, Laws 1909, ch. 800, and it was enacted that "there shall be no difference between Saturday and any other secular or business day, as far as negotiable instruments are concerned."

In Washington, by amendment in 1915, everything is omitted after the second paragraph, and in an additional section (3584) it is provided that, "Where the day or the last day of doing any act herein required or permitted to be done, falls upon Sunday or a holiday, the act may be done on the next succeeding secular or business day."

In the Colorado Act the following words are substituted: "Instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday."

The words "or becoming payable" have been interpolated after the words, "Instruments falling due," in the third sentence in some cases in the act as originally adopted, in others by subsequent amendment in Arkansas, Indiana, Kansas, Minnesota, Missouri, New Jersey, New York and Virginia.

In the Massachusetts Act (by amendment in 1902), the words "or payable" were inserted after "falling due."

The New Hampshire Act makes the same insertion.

The insertion of the words "becoming payable" or "or payable," seems unnecessary and to make no difference in the legal effect of the provision.

In Minnesota, by amendment in 1917, c. 204, s. 1, the following clause was added to the section, "and if presented after 12 o'clock noon on Saturday, when that entire day is not a holiday, may at the option of the payer be then paid.

The third sentence of this section presents the anomaly that while an instrument falling due on Saturday must be presented on Monday in order to hold drawers and indorsers, yet if the instrument is payable at a special place and the person primarily liable is able and willing to pay it there at maturity (see section 70), it must be presented on Saturday in order to charge the parties liable for such payment with interest after Saturday. This question has arisen in a practical way in Boston, and counsel for both parties agreed upon this construction of the sentence, but the question has not been submitted to a court. It seems, also, that if a bank or other collecting agent should fail to present the instrument on Saturday, such agent might be chargeable with negligence and liable for any loss thereby caused to the principal. Discussion of these questions by the Clearing House Committee of Boston led to the adoption (Massachusetts Laws, 1910, chap. 417) of the following amendment, applicable to instruments made after its enactment:

"When the day of maturity falls upon Saturday, Sunday, or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may at the option of the holder be presented for payment before 12 o'clock noon on Saturday, when that entire day is not a holiday, provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day."

See for a fuller discussion of these questions an article by Professor Williston in 23 Harvard Law Rev. 603, and Brannan, Some Necessary Amendments of Negotiable Instruments Law, 26 Harvard Law Rev. 592.

The Iowa Act adopts section 85, but also by a subsequent section makes this additional provision:

"Section 198. DAYS OF GRACE—*demand made on.* A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face."

The title of this section is a misnomer, for it simply permits the holder to make demand not only on the day of maturity, but on

any of the three following days except a Sunday or a holiday. The "grace" is to the holder, not to the acceptor or maker. And the same ambiguities and uncertainties arise here as under section 85; namely, whether if an instrument payable at a special place where the acceptor or maker is able and willing to pay, is not presented on the day of maturity, the acceptor or maker will be liable for interest for the three following so-called days of grace.

Also whether an agent for collection of such an instrument failing to make presentment on the day of maturity, whereby loss results, will not be chargeable with negligence, although presentment is made within three days following the day of maturity.

In the absence of evidence to the contrary, the presumption is that the common law which allowed days of grace, still remains the law of a sister state. Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812. The N. I. L. was in force in the sister state (New York) at the time, but that fact was not shown.

But in Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790, Ann. Cas. 1915B, 1069, S. C. secs. 89, 94, 107, the court took judicial notice that the Negotiable Instruments Law was part of the law of New York.

ENGLAND—

A bill is dishonored by the refusal of the acceptor to pay at any time on the last day of grace, and notice of dishonor may be given at once to the drawer and indorsers. But no right of action arises until the following day. Kennedy v. Thomas [1894], 2 Q. B. 759.

Sec. 86. Time—How Computed.

Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

The statutory construction laws of the respective states should be consulted in connection with this and similar sections, *e. g.*, see Consolidated Laws of New York, 1909, secs. 20, 24, 25.

A note dated November 8, 1908, and payable twelve months after date, was presented for payment November 9, 1909. *Held,* that it should have been presented November 8, 1909. Lewry v. Wilkinson, 135 La. 105, 64 So. 1003, S. C. sec. 64.

Sec. 87. Rule Where Instrument Payable at Bank.

Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.[1]

The Illinois, Nebraska and South Dakota Acts omit this section.

In Missouri, by an amendment in 1909, and in New Jersey, by amendment in 1909, the following was added at the end of the section: "But where the insrument is made payable at a fixed or determinable future time, the order to the bank is limited to the day of maturity only."

In Minnesota the words "shall not be" are substituted for "is."

Brown v. First Nat. Bank, 216 Mass. 298, 103 N. E. 780; City of Newburyport v. First Nat. Bank, 216 Mass. 304, 103 N. E. 782, S. C. sec. 56; Heinrich v. First Nat. Bank, 219 N. Y. 1, 113 N. E. 531, L. R. A. 1917A, 655, S. C. sec. 160.

A bank has no authority to pay notes of a depositor made before the adoption of the Negotiable Instruments Law and payable at another bank. Elliott v. Worcester Trust Co., 189 Mass. 542, 75 N. E. 944. When the depositor sues the bank, the bank can not claim the rights of a *bona fide* purchaser for value before maturity when it simply pleads a general denial and payment and files no claim in set-off. *Ib.*

This section applies only where the instrument is made payable at a particular bank named. The fact that a note made payable at "any bank in Boston," was sent for collection to a bank there, in which the maker had a deposit when the note matured, did not authorize that bank to pay the note from such deposit. Carpenter v. National Shawmut Bk., 187 Fed. Rep. 1, 109 C. C. A. 55.

Failure of the holder of a note, payable at a bank, to present the note to the bank for payment at maturity, does not release the maker, although he had sufficient funds in the bank for its payment, and the bank subsequently fails, since by section 70 no presentment is necessary to charge a party primarily liable. The rule applicable to a check does not apply, since the drawer of a check is only secondarily liable. Binghampton Pharmacy v. First Nat. Bank, 131 Tenn. 711, 176 S. W. 1038, S. C. sec. 70.

But in New England Nat. Bank v. Dick, 84 Kan. 252, 114 Pac. 378, the court intimated that if the holder of a note payable at a bank fails to present it at the bank at maturity and the bank fails, the maker will be wholly discharged.

[1] Not in B. E. A.

And in Baldwin's Bank v. Smith, 215 N. Y. 76, 109 N. E. 138, Ann. Cas. 1917A, 500, Miller, J., said that, "It is incumbent on the holder of the paper to secure payment, and loss resulting from his neglect should fall on him, not on the drawer, who has no further duty to perform. I am unable to perceive why the same reason does not hold good in the case of a note, payable at a bank, where the maker has funds to meet it at maturity, especially since such a note is by statute made the equivalent of a check." In this case the defendant made a promissory note payable at the A bank. The plaintiff bank became the holder of the note and sent it to the A bank for "collection and remittance." On the day of maturity, the maker telephoned to the bank to charge the note to his account and was told that this would be done. But the bank did not charge the note to his account, made no entry crediting plaintiff and did not remit the money. Seven days later the bank failed. The maker during all this time had sufficient funds at the bank to pay the note. *Held,* that the note was paid and the maker discharged, and further, that, assuming the note was not paid, yet the A bank was plaintiff's agent to secure payment and that its failure to do so was negligence and that the loss must fall on the plaintiff, not on the maker. *Sed quaere* whether the facts justify a finding that the note was paid? See dissenting opinion of two judges and note in 29 Harvard Law Rev. 204. But since by section 87 a note, made payable at a bank, is equivalent to an order on the bank, the consequences of failure by the holder to present for payment at maturity or of failure to notify the maker of dishonor should be the same as in the case of the drawer of a check, and as failure by the bank to remit within a reasonable time indicates that the note has been dishonored, the maker might well have been held to be discharged by such failure to give notice.

A note, payable at the A bank, was deposited in the B bank for collection and sent by the B bank to the A bank for "collection and remittance," the latter bank being authorized to pay notes of the maker when made payable there. The A bank at the maturity of the note wrote a check on another bank for remittance of the amount, stamped "Paid" on the face of the note, cancelled the note by perforation and filed it with paid checks, but had made no entries of the matter on the books of the bank. At this point the A bank was notified that the maker had made an assignment for the benefit of creditors and was directed by the assignee to withhold the check drawn for remittance, which was done. *Held*, that the note was paid and that the A bank was liable to the B bank for the amount. The N. I. L. was not cited. Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670.

But in Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996, S. C. secs. 3, 132, orders drawn on a bank were presented by the payees for payment. The cashier received them and stamped on them, "Paid Oct. 16, 1916," and drew the checks to the payees, but

retained the checks until the afternoon of the same day, when the bank was served with process of garnishment against the drawer. It was held that the orders were not paid and that the garnishor was entitled to the funds.

A distinction may be drawn in these cases, although it does not seem to have been made by the courts. As between banks, custom and usage may be such that the drawee bank is authorized by the collecting bank to credit the amount to the collecting bank and that such credit constitutes a payment even before a remittance of money or check is made, as in such cases as Consolidated Nat. Bank v. First Nat. Bank, *infra*, sec. 136, p. 365, and by like custon and usage the stamping of the instrument as "paid" may have the same effect, as in Nineteenth Ward Bank v. First Nat. Bank, *supra*, p. 281, and other cases. In these cases the drawer of a check is, of course, discharged, and it is submitted that under section 87 the maker of a note payable at a bank should be discharged. But if a check or note payable at a bank is presented to the bank by the holder in person, stamped by the teller "paid," but before he had paid over the money, the teller is notified that the drawer had made an assignment for the benefit of creditors, or had not the money on deposit, or the deposit had been garnished, and the teller then erased the paid mark and returned the check, it could hardly be claimed that this was a payment so as to discharge the drawer.[1] So also, if the instrument was sent by the holder to the bank by messenger or by mail. The instrument has not, in fact, been paid, but it may well be that the holder or the collecting bank, even in the absence of any custom or usage, should have the option of holding the drawee bank because of the manner in which it has dealt with the instrument, which was the holder's property, or of holding the drawer or maker because the instrument has not been honored.

A note, payable at a bank, was sent by a bank in which it had been deposited to the former bank for collection, and was presented to the maker who wrote across the face, "Charge to my account," and signed his name, which the cashier said was all right. The amount to the credit of the maker was slightly less than the amount of the note, but the next day the maker deposited money amounting to more than the note, and thereafter kept more than that amount to his credit. The bank did not charge the maker's account or remit the money, but held the note twelve days and then went into the hands of a receiver. *Held*, that though the bank had no authority to accept a part payment, yet under the circumstances the note was paid and the payee could not hold the maker. Peaslee-Gaulbert Co. v. Dixon, 172 N. C. 411, 90 S. E. 421.

In accordance with a notation on the margin of a note, the holder sent it for collection to a bank which held, as a special deposit, money of the maker. The cashier, at maturity, notified the maker, and the maker directed the cashier to pay the note out

[1] Hanna v. McCrory, *supra*, p. 281.

of his money. The cashier said, "All right, your note is paid," and asked what he should do with the note. The maker directed the cashier to hold the note until the maker should call for it. *Held*, that the note was paid at the time of this conversation. The N. I. L. was not cited. Belk v. Capital Fire Ins. Co., 100 Neb. 260, 159 N. W. 405.

In Peninsula Nat. Bank v. Hans Pederson Co., 91 Wash. 621, 158 Pac. 246, the instrument, which was made payable at a bank, was, however, not negotiable, because it was not made payable to order or bearer or equivalent words, so that the references to the statute and the discussion as to whether it had been presented with due diligence so as to hold the drawer under the statute, seem irrelevant.

See, also, other cases under sections 119-3 and 136 as to the effect of stamping an instrument "paid."

Sec. 88. What Constitutes Payment in Due Course.

Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

A joint maker of a note, who was a surety, placed the amount of the note and costs on deposit in the bank, in the name of a trustee, to be transferred to the bank in exchange for an assignment of a judgment, when recovered against the defendant, the principal-maker. This was held not to constitute a payment of the note and no defense. The N. I. L. was not cited. Capitol Nat. Bk. v. Robinson, 41 Wash. 454, 83 Pac. 1021.

The rule that an agent's authority is revoked by the death of the principal, without notice, does not apply to payment of a check by the drawee bank having no knowledge of the drawer's death, even though the check was without consideration. Glennan v. Rochester Trust, etc., Co., 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. (N. S.) 302.

See Balkam, 14 Harvard Law Rev. 588; Zane, 17 Harvard Law Rev. 104, for discussion of the question whether the death of the drawer revokes an unaccepted check.

In Massachusetts, by statute, "The death of the drawer does not operate as a revocation of the authority to pay a check if the check is presented for payment within ten days from the date thereof."

The English Bills of Exchange Act, section 75, provides, "The duty and authority of a banker to pay a check drawn on him by his customer are determined by (1) a countermand of payment, (2) notice of the customer's death." Since the Negotiable Instruments Law contains no provision upon this point, it must, as an

omitted case, be governed by the rules of the law merchant under section 196.

ENGLAND—

The payee of a demand note held a mortgage to secure the debt. He sold and transferred the mortgage to one person for full value and afterwards indorsed the note to a holder in due course. *Held,* that the note was not paid by the sale of the mortgage. Glasscock v. Balls, 24 Q. B. D. 13, S. C. sec. 119-1.

ARTICLE VII.

NOTICE OF DISHONOR.

Sec. 89. To Whom Notice of Dishonor Must Be Given.

Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged.

AMES: By section 89, if the drawer of a check is not notified of the dishonor, he will be absolutely discharged, although he has suffered no loss by the failure to give him notice. Yet by section 186 the drawer is only discharged to the extent of loss caused by delay in presentment of the check for payment within a reasonable time.

BREWSTER: Disputes the correctness of Professor Ames' criticism and also contends that in any event the holder could still sue on the debt.

AMES: The holder could not sue on the debt if the check had been given in absolute payment, or for the payee's release of a claim against a third person.

MCKEEHAN: Agrees with Professor Ames that the provisions of the section are inaccurate, but the fact that they have proved satisfactory in the English Act for twenty years, indicates that little or no harm will result from the inaccuracy.

Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; Fritts v. Kirchdorfer, 136 Ky. 643, 124 S. W. 882; Ebling Brewing Co. v. Reinheimer, 32 Misc. Rep. 594, 66 N. Y. Supp. 458, S. C. sec. 108; Fonseca v. Hartman, 84 N. Y. Supp. 131, S. C. sec. 108; American Exch. Nat. Bank v. American Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. Supp. 1006, S. C. secs. 96, 97; Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N.S.) 847, S. C. secs. 64-1, 120-6; American Nat. Bank v. National Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96, 97; Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113, S. C. secs. 70, 82-3, 109.

Unreasonable delay in giving notice of dishonor of a check will discharge the indorser whether such delay causes loss to him or not. Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447, S. C. secs. 23, 71, 186.

Where notice of dishonor to the drawer of a check is required it must be alleged in the complaint. Ewald v. Faulhaber Co., 105 N. Y. Supp. 114; Studebaker Sons Co. v. Fuether, 123 N. Y. Supp. 118. So also, as to the indorser of a promissory note, Sykes v. Kruse, 49 Colo. 560, 113 Pac. 1013; Hall v. First Nat. Bank, 196 Ala. 627, 72 So. 171.

But notice of dishonor is not necessary if the drawer had countermanded payment; and the complaint may be amended so as to conform to proof of such fact. Scanlon v. Wallach, 53 Misc. Rep. 104, 102 N. Y. Supp. 1090.

Judgment for the payees of a check against the drawer can not be sustained in the absence of proof that notice of dishonor was given to the drawer. Kuflick v. Glasser, 114 N. Y. Supp. 870.

The drawer of a check is discharged by failure to give him notice of dishonor, the bank refusing to pay because it was short of funds, and subsequently proving to be insolvent. Bacigalupo v. Parrilli, 112 N. Y. Supp. 1040. It does not appear in the report of this case whether the bank paid any dividend or not.

The foregoing cases show that the danger apprehended by Professor Ames in his criticism on this section is a real one.

In Morris-Miller Co. v. Von Pressentin, 63 Wash. 74, 114 Pac. 912, it was held that failure to give notice of dishonor of a check to the drawer will not discharge him unless it caused loss which he would not otherwise have sustained. But the N. I. L. was not cited and the point, as affected by the statute, does not seem to have been considered.

To charge an indorser the complaint must allege presentment to the maker and notice of dishonor, unless the same are dispensed with under sections 82 and 109 respectively, or is not required under section 118. Robinson v. Holmes, 57 Ore. 5, 109 Pac. 754.

An indorser is entitled to notice of dishonor, even though he is an officer of the bank holding the instrument, unless it is his duty as officer to give such notice on behalf of the bank. First

Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856; Frazee v. Phoenix Nat. Bank, 161 Ky. 175, 170 S. W. 532, S. C. sec. 193.

In an action against the indorser of a note it is not sufficient to allege that upon maturity the note was duly presented for payment, and the indorser duly notified of non-payment. The allegation and the evidence must show the demand and notice to have been upon such a day as will charge the defendant. The N. I. L. was not cited on this point. Hoyland v. National Bank of Middlesborough, 137 Ky. 682, 126 S. W. 356. *Sed quaere,* whether this is not too technical? See next case.

An allegation that due notice of the protest of a note was duly given to an indorser is a sufficient allegation of notice of dishonor; the term "protest" including in a popular sense all the steps taken to fix the liability of an indorser, and the word "duly," in legal parlance, meaning "according to law," and relating not to form only, but including both form and substance. Sherman v. Ecker, 59 Misc. Rep. 216, 110 N. Y. Supp. 265.

Plaintiff must allege that notice of dishonor was given to the indorser of a note, or that it was waived. An allegation that the note was duly protested is not enough. The N. I. L. was not cited. Wisdom & Levy v. Bille, 120 La. 700, 45 So. 554.

But Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790, Ann. Cas. 1915B, 1069, S. C. secs. 85, 94, 107, is *contra.* Inasmuch, as by sections 153 and 154, a protest appears to be only a formal statement in writing by a notary or other persons making it, of the fact of presentment, the time, place and manner thereof, etc., and does not include a notice, which is a subsequent act, the Louisiana decision seems more correct.

Where a statute authorized suit on a note by motion and notice, the notice must state a cause of action, and in a suit against an indorser it must show that the note was protested or notice of dishonor given. Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S. E. 342. The N. I. L. was not cited in this case.

Failure to notify an indorser of an installment note of the non-payment of previous installments does not affect his liability for later installments of the non-payment of which he has been duly notified. Hopkins v. Merrill, 79 Conn. 626, 66 Atl. 174, S. C. sec. 66. The note did not appear to contain an option to declare the whole sum due for non-payment of any installment. *Cf.,* Galbraith v. Shepard, *supra,* section 70, p. 259.

A joint maker, though a surety, is not an indorser and is primarily liable, and, therefore, is not entitled to notice of dishonor. Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875.

An action against an indorser after legal notice of dishonor is not barred because judgment was rendered in his favor in a previous action solely for the reason that he had not been notified before that action was brought. Peck v. Easton, 74 Conn. 456, 51 Atl. 134, S. C. sec. 64-1.

Although presentment is excused because no administrator has been appointed (section 76), yet if the instrument is dishonored (section 83) notice of dishonor must be given to the indorser in compliance with section 89. Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 96.

Accommodation indorsers are entitled to notice of dishonor. Perry v. Taylor, 148 N. C. 362, 62 S. E. 423; House v. Fayssoux, 168 N. C. 1, 83 S. E. 692, Ann. Cas. 1917B, 835, S. C. sec. 63; Young v. Exchange Bank of Kentucky, 152 Ky. 293, 153 S. W. 444, Ann. Cas. 1915B, 148.

Sec. 90. By Whom Given.

The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.[1]

Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, S. C. sec. 91; First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4, 123.

Sec. 91. Notice Given By Agent.

Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4, 123.

A note made by A to the order of B, indorsed by B and also by A, was protested for non-payment. Notice addressed to B was sent to A, who forwarded it to B. *Held*, that although A could not give notice in his own behalf to B under section 90, since B was presumptively an accommodation indorser for A and not liable, yet A could forward it to B, on behalf of the holder, and as his

[1] "The notice must be given by or on behalf of the holder or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill." B. E. A. s. 49 (1).

agent. Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768.

The cashier of the drawee bank which had refused to pay a check, gave the check to a notary to protest, which was done. *Held*, that the possession of the check by the cashier was evidence of his agency of the holder to present it for protest. Hooper v. Herring (Ala.), 70 So. 308, S. C. sec. 171.

Sec. 92. Effect of Notice Given on Behalf of Holder.

Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, S. C. sec. 91; Piedmont Carolina Ry. Co. v. Shaw, 223 Fed. Rep. 973, 138 C. C. A. 227, S. C. secs. 56, 93.

Sec. 93. Effect Where Notice is Given By Party Entitled Thereto.

Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Where the indorsers of a promissory note were promoters of a corporation, which made the note, and one or more of them received from the bank holding the note, as agent of the holder for collection, verbal notice of the dishonor of the note, and they all spoke together about the matter, the notice from the indorsers to each other enured to the benefit of the holder. Piedmont Carolina Ry. Co. v. Shaw, 223 Fed. Rep. 973, 138 C. C. A. 227, S. C. sec 56.

Sec. 94. When Agent May Give Notice.

Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has

himself the same time for giving notice as if the agent had been an independent holder.

In Arkansas after the words "receipt of said notice" in the second paragraph, the rest of the section reads as follows: "himself must do so within the same time for giving notice as if the agent had been an independent holder."

Where an agent for collection of a note does not know an indorser's address and mails to the principal a notice addressed to such indorser in blank with postage for forwarding, the agent is not guilty of negligence in collecting. Brill v. Jefferson Bank, 159 App. Div. 461, 144 N. Y. Supp. 539.

Where a bank, holding a note for collection, sent notice of dishonor to the bank from which it recived the note on the day after dishonor, and it was received the next day, and notice of dishonor was mailed at once to the prior indorser, both banks used due diligence. Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790, Ann. Cas. 1915B, 1069, S. C. secs. 85, 89, 107.

It is not necessary that notice of dishonor be given by the holder, at presentment, directly to the beneficial owner, disregarding all intervening holders for collection. Blue Ribbon Garage v. Baldwin, 91 Conn. 674, 101 Atl. 83, S. C. sec. 96.

ENGLAND—

A branch of a country banking company sent to a London bank for collection a bill bearing several indorsements. Upon dishonor the London bank sent notice by post on the next day to another branch of the forwarding bank. The next day notice was sent by telegraph to the right branch, and the subsequent notices of dishonor to other parties were given in due time. *Held,* that sufficient notice of dishonor was given and the first indorser was liable. Fielding v. Corry [1898], 1 Q. B. 268.

Sec. 95. When Notice Sufficient.

A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

The Kentucky Act omits the word "not" in the first line, and substitutes "written" for "verbal" in the third line.

In Kentucky and North Carolina the words "the notice" are omitted after the word "vitiate" in the last sentence.

Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664, S. C. secs. 96, 82-3.

Under the Kentucky Act the indorser is released unless the notice is in writing. Grayson Co. Bank v. Elbert, 143 Ky. 750, 137 S. W. 782, S. C. sec. 96.

Where the notice of protest described the note correctly and the envelope was correctly addressed and was received and opened by the indorser, the notice was sufficient, although the notice was on its face by mistake addressed to the maker. Wilson v. Peck, 66 Misc. Rep. 179, 121 N. Y. Supp. 344, S. C. secs, 103-3, 106. But it was held otherwise where both the notice and the envelope containing it were addressed to another party. Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874, S. C. sec. 97, in which case the N. I. L. was not cited.

Sec. 96. Form of Notice.

The notice may be in writing or merely oral[1] and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.[2]

The words "or merely oral" are omitted in the Kentucky Act.

Scarbrough v. City Nat. Bank, 157 Ala. 577, 48 So. 62; Derham v. Donahue, 155 Fed. Rep. 385, 83 C. C. A. 657.

Oral notice of dishonor, given personally or through an agent, is enough to charge the indorsers. Kelly v. Theiss, 77 App. Div. 81, 78 N. Y. Supp. 1050. But not in Kentucky, where, as mentioned, the act omits the words "or merely oral." Grayson Co. Bank v. Elbert, 143 Ky. 750, 137 S. W. 782, S. C. sec. 95.

Following receipt of his notice of dishonor, the owner of the note at once notified a prior indorser by telephone and, on the following day, visited and orally notified another indorser. *Held*, that these notices complied in all respects with the requirements of law. Blue Ribbon Garage v. Baldwin, 91 Conn. 674, 101 Atl. 83, S. C. sec. 94.

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[1] The English Act reads "by personal communication" instead of "merely oral." B. E. A. s. 49 (5).

[2] The words "or through the mails" are omitted in B. E. A. s. 49 (5), but the provision may be implied from s. 49 (15), which is the same as N. I. L. s. 105.

Notice of dishonor may be given by telephone if it be clearly shown that the party to be notified was really communicated with, that is, fully identified as the party at the receiving end of the line. American Nat. Bank v. Nat. Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 97. *Contra,* Mayer v. Boyle, 132 N. Y. Supp. 729.

A notice which contained a copy of the note and declared that payment had been demanded and refused, is sufficient. Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874, *infra,* S. C. sec. 97, distinguished. Zollner v. Moffitt, 222 Pa. 644, 72 Atl. 285; Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664, S. C. sec. 82-3.

An informal letter stating the amount, date of maturity, names of makers and indorsers, and that the note was not attended to and demanding payment, is sufficient. Doherty v. First Nat. Bank, 170 Ky. 810, 186 S. W. 937, S. C. secs. 100, 102, 109.

Failure to state in the notice of dishonor the date of the making and maturity of a note and the name of the payee does not invalidate the notice. Herrmann Lumber Co. v. Bjurstrom, 74 Misc. Rep. 93, 131 N. Y. Supp. 689.

The word "may" in the last paragraph of section 96 is to be construed as "must." Price v. Warner, 60 Ore. 7, 118 Pac. 173, S. C. sec. 103.

Where personal service is relied upon, the evidence must show either actual personal service or an ordinarily intelligent, diligent effort to make personal service upon the indorser either at his place of business during business hours, or at his residence if he have no place of business; but if he be absent, it is not necessary to call a second time, and the notice may, in that event, be left with anyone found in charge, or if there be no one in charge, or no one there, then the giving of notice is deemed to be waived. American Exchange Nat. Bank v. American Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. Supp. 1006, S. C. sec. 97

After several efforts to find an indorser, notice of the dishonor was delivered at his store to his wife, who acted as his assistant. *Held,* a sufficient service, especially when the indorser actually received the notice upon the same day. Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89.

The certificate of protest being (by statute) *prima facie* evidence of the facts therein stated, the burden is on the indorser to show that he did not receive notice either personally or through the mails, where the certificate alleges that he was duly notified of dishonor.

The assistant treasurer of a corporation indorsed one of its notes. All the checks of the corporation were required to be signed by him so that the note could not be paid without his act and knowledge, and it appeared that he actually knew the note was unpaid. *Held,* that formal written notice was unnecessary to charge him as indorser. William S. Merrell Chemical Co. v. Root, 152 N. Y. Supp. 368.

Sec. 97. To Whom Notice May Be Given.

Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89, 96.

Leaving the notice at the window of the cashier of a hotel corporation is not sufficient service, it not appearing that any one's attention was drawn to the notice, or that any one was present, and the president and managers having testified that it was not brought to their attention. Am. Exch. Nat. Bank v. Am. Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. Supp. 1006, S. C. sec. 96.

Both the notice of dishonor and the envelope containing it were addressed to the second indorser and delivered by a notary public to the first indorser. *Held,* that this did not fix the liability of the first indorser, even though he read the notice; it did not inform him that he was looked to for payment. The N. I. L. was not cited. Marshall v. Sonneman, 216 Pa. 65, 64 Atl. 874; *Cf.* Wilson v. Peck, 66 Misc. Rep. 179, 121 N. Y. Supp. 344,. S. C. secs. 95, 103-3, 106.

Oral notice of dishonor given by telephone to a clerk of an indorsing commercial corporation, is not notice to the corporation, especially when it does not appear that the clerk had communicated the notice to any one connected with the management of the business of the corporation. American Nat. Bank v. Nat. Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96.

Sec. 98. Notice Where Party is Dead.

When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.[1]

In Arkansas the words "must be sent by mail" are substituted for "may be sent" in the last paragraph.

A notice of dishonor mailed to a deceased indorser by name in care of the executor, naming him, at his address, is sufficient evi-

[1] The provision in the last paragraph is not in B. E. A., see s. 49 (9).

dence of reasonable diligence. Second National Bank v. Smith (N. J.), 103 Atl. 862.

Notice to the representative of a deceased indorser of a note, made and payable in Canada, must be given in accordance with the laws of Canada, although the indorser's residence has been in New York. Merchants' Bank v. Brown, 86 App. Div. 599, 83 N. Y. Supp. 1037, S. C. sec. 125.

The Canadian Act contained a provision substantially the same as section 98 except that the last sentence was omitted. It was held that mailing notice of dishonor to an indorser known to be dead, directed to a post office known to be one at which he had not received mail, was not a good notice.

Sec. 99. Notice to Partners.

Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.[1]

Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624; Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, S. C. sec. 91.

Notice to one partner is notice to all the firm although it was fraudulently suppressed by the partner receiving it. Kensington Nat. Bk. v. Ware, 32 Pa. Super. Ct. 247.

Sec. 100. Notice to Persons Jointly Liable.

Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Joint indorsers, to whom notice of dishonor has been given, are not discharged by reason of failure to give notice to the other joint indorsers. Doherty v. First Nat. Bank, 170 Ky. 810, 186 S. W. 937, S. C. secs. 96, 102, 109.

Sec. 101. Notice to Bankrupt.

Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit

1 Not in B. E. A., except inferentially from section 49 (11), which is substantially the same as N. I. L. s. 100.

of creditors, notice may be given either to the party himself or to his trustee or assignee.[1]

This section settles a conflict. It had been held that notice of dishonor to an assignee for the benefit of creditors was sufficient.[2] The contrary was held in Ohio in a case making a distinction between bankruptcy and a voluntary assignment for the benefit of creditors.[3]

Sec. 102. Time Within Which Notice Must Be Given.

Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.[4]

German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, S. C. sec. 75; American Nat. Bank v. Nat. Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96, 97.

Defects in the allegations of notice of dishonor and waiver of notice in the petition, are cured by a finding of the jury that notice of dishonor was given to defendant in writing in proper time, and that defendant declared his intention to pay. Doherty v. First Nat. Bank, 170 Ky. 810, 186 S. W. 937, S. C. secs. 96, 100, 109.

ENGLAND—

When payment of a bill of exchange is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonor to the drawer and the

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[1] Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee. B. E. A. s. 49 (10).

[2] Callahan v. Bank of Kentucky, 82 Ky. 231; American Nat. Bank v. Junk Bros., 94 Tenn. 634, 30 S. W. 753.

[3] House v. Vinton Nat. Bank, 43 Ohio St. 436, 1 N. E. 129.

[4] "Notice may be given as soon as the bill is dishonored and must be given within a reasonable time thereafter. In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless (a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonor of the bill. (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter." B. E. A., s. 49 (12), (a), (b).

indorsers, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day. Kennedy v. Thomas [1894], 2 Q. B. 759.

Sec. 103. Where Parties Reside in Same Place.

Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:—

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following.[1](*a*)

Subsection 2 in the Rhode Island Act reads as follows: "If given at his residence it must be given before ten o'clock in the evening of the day following."

Jurgens v. Wichman, 124 App. Div. 531, 108 N. Y. Supp. 881, S. C. sec. 107.

Notice given "two or three days after the note was due" is too late. Solomon v. Cohen, 94 N. Y. Supp. 502; Siegel v. Dubinsky, 56 Misc. Rep. 681, 107 N. Y. Supp. 678.

The holder's agent called at defendant's place of business to give him notice of dishonor of the note and found that he was absent from the city. After calling again in four or five days, he saw defendant and gave him notice. *Held*, the notice was not given in time under sections 103 and 113. The word "may" in section 96 is to be construed as "must" and the impossibility of giving oral notice does not excuse delay; notice by mail being practicable. Price v. Warner, 60 Ore. 7, 118 Pac. 173, S. C. sec. 96.

(*a*) A notice placed in a mail chute on the day of protest, but not postmarked until the next day at noon, is mailed in time and

[1] See note 4 to section 102, *supra*, p. 294, for the B. E. A. provision.

it will be presumed, in the absence of evidence to the contrary, that the notice reached its destination by 5 o'clock, which would be before the close of business hours, both parties residing in Manhattan. The indorser swore that he did not get the notice until the following day, but did not testify that he was at his office on the day it was mailed. This was not enough to show that the notice was not received in time. Wilson v. Peck, 66 Misc. Rep. 179, 121 N. Y. Supp. 344, S. C. secs. 95, 106.

Sec. 104. Where Parties Reside in Different Places.

Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.[1](*a*)
2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.[2](*b*)

In Kansas, Nebraska and Ohio the words "next preceding paragraph of this section" are substituted for the words "last subdivision."

Second National Bank v. Smith (N. J.), 103 Atl. 862, S. C. sec. 98; Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; Jurgens v. Wichmann, 124 App. Div. 531, 108 N. Y. Supp. 881, S. C. sec. 107.

(*a*) Departure time for the mail the day after dishonor was between 9 and 10 o'clock A. M. This was a convenient time and deposit on the evening of that day after the closing of the mail for that day was too late. Even if this were not so, a failure to

[1] See note 4 to section 102, *supra*, p. 294, for the B. E. A. provision.
[2] Not in B. E. A.

prepay sufficient postage and to remedy the mistake after knowledge thereof for five days released the indorser beyond any possible question. First Nat. Bank of Shawano v. Miller, 139 Wis. 126, 120 N. W. 820, S. C. sec. 2-5.

Proof of notice of protest properly addressed, stamped and mailed in time to go by mail on the day following the dishonor, is due notice, under sections 104 and 105, and the fact that the notice was addressed to one, as treasurer, who indorsed the note in his individual capacity does not affect the validity of the notice. Farmer's Nat. Bk. v. Howard, 71 W. Va. 57, 76 S. E. 122.

Plaintiff received in Boston, Oct. 2d, notice of dishonor of a note. Plaintiff's notice to defendant indorser in Somerville, Mass. was mailed in Boston, Oct. 4th, postmarked 8:30 P. M.. There were twelve daily mails between Boston and Somerville. *Held*, that the words "go by mail" mean an actual departure in the course of mail from the post office in which the notice was deposited, in case there is a mail from that post office to the destination of the notice at a convenient hour on the required day, and that it could not be ruled, as a matter of law, that plaintiff had sustained the burden required by the statute. Harris v. Baker, 226 Mass. 113, 115 N. E. 292.

(*b*) Oral notice given by the holder who lived at Denver, to an indorser residing in Colorado Springs on the day following the day the holder received notice from his agent for collection is within time, the agent having given his principal notice the day after the dishonor. De La Vergne v. Globe Printing Co. (Col. App.), 148 Pac. 923, S. C. secs. 75, 115-2.

Sec. 105. When Sender Deemed to Have Given Due Notice.

Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624; First Nat. Bank v. Korn (Mo. App.), 179 S. W. 721, S. C. secs. 63, 71, 155; State Bank v. Solomon, 84 N. Y. Supp. 976; Zollner v. Moffatt, 222 Pa. 644, 72 Atl. 285, S. C. sec. 96; First Nat. Bank of Shawano v. Miller, 139 Wis. 126, 120 N. W. 820, S. C. secs. 2, 5, 104.

Where notice of dishonor is addressed to an indorser at an address other than the one given on the note and is not received

by him, he is discharged from liability. Century Bank v. Breitbart, 89 Misc. Rep. 308, 151 N. Y. Supp. 588.

Although non-receipt of a duly mailed notice of dishonor does not discharge an indorser, evidence of such non-receipt is competent on the question whether the notice was actually mailed. Union Bank of Brooklyn v. Deshel, 139 App. Div. 217, 123 N. Y. Supp. 585.

A notary public having produced his certificate showing demand and refusal and notice to defendant indorser, and also testified that he gave notice to defendant by letter duly stamped, addressed, and mailed, it was not error to exclude defendant's evidence that he had not received the notice. First Nat. Bank v. Delone, 254 Pa. 409, 98 Atl. 1042, S. C. sec. 120-6.

A plaintiff suing on an indorsement of a dishonored negotiable note has the burden of proving notice of dishonor. Where the notary, who testified that within due time he mailed notice of non-payment of a note, was cashier of the plaintiff bank, and therefore an interested witness, and the indorser denied receiving notice, and the president of the maker testified that, three days after maturity, he saw the note and that the alleged indorsement of protest was not written on the note, the question whether notice of dishonor was given, was for the jury. First Nat. Bank v. Star Watch Case Co., 187 Mich. 224, 153 N. W. 722.

Proof of execution of notices of dishonor, of inclosing them in stamped envelopes and placing them with other mail matter carried to the post office by a clerk, whose business this was, is enough without calling the clerk, to justify a finding that the notices were duly mailed, in an action against the indorser. Central Nat. Bank v. Stoddard, 83 Conn. 332, 76 Atl. 472.

Notice of protest was addressed to "S. H. (the indorser), 24 E. Market St., Wilkesbarre, Pa." It was found by the referee that defendant's place of business was at "Nos. 22 and 23 E. Market St., Wilkesbarre, Pa.," that there was another S. H. residing and doing business in Wilkesbarre to whom defendant's letters were often delivered by mistake and that defendant never received notice of the protest. *Held*, these facts were insufficient to warrant a conclusion of law that due notice had been given to the indorser. Siegel v. Hirsch, 26 Pa. Super. Ct. 398.

Sec. 106. Deposit in Post Office—What Constitutes.

Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department.[1]

In Arkansas the words "when deposited," in the second line, are omitted, probably by mistake.

[1] Not in B. E. A.

Phoenix Brewing Co. v. Weiss, 23 Pa. Super. Ct. 519; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624.

Deposit of a note of protest in a mail chute under the control of the post office is sufficient. Wilson v. Peck, 66 Misc. Rep. 179, 121 N. Y. Supp. 344, S. C. sec. 95, 103-3.

A notice of protest properly addressed and left in the place in the notary's office where mail was usually collected by the postman was not a mailing of the notice as required by the statute. Friedman v. Maltinsky (Pa.), 103 Atl. 731.

Sec. 107. Notice to Subsequent Party—Time of.

Where a party receives[1] notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Brill v. Jefferson Bank, 159 App. Div. 461, 144 N. Y. Supp. 539, S. C. sec. 94.

When the answer alleges that the indorser had no notice of dishonor, the burden is on the holder to show that due notice was given. It is not shown by testimony of a notary that, not knowing the address of the indorser, he inclosed the notice of dishonor to a subsequent indorser with postage for forwarding the notice to the prior indorser. Fuller Buggy Co. v. Waldron, 112 App. Div. 814, 99 N. Y. Supp. 920. The N. I. L. was not cited in this case.

A bank holding an indorsed note for collection may give notice of its dishonor to all parties liable thereon or only to its principal, from whom it received the note, leaving the latter to notify in turn its principal or antecedent indorser and so on down the line. Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790, Ann. Cas. 1915B, 1069, S. C. secs. 85, 89, 94.

Plaintiff indorsed and deposited a check for collection in bank on the 28th. On the 29th he was notified of the dishonor of the check, and on the 30th he notified the defendant indorser by telegraph. *Held*, that the notice was in due time. Jurgens v. Wichmann, 124 App. Div. 531, 108 N. Y. Supp. 881.

A joint indorser who has received notice of dishonor and would be entitled to contribution, may give notice to his co-indorsers

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[1] The English Act interpolates "due." B. E. A. s. 49 (14).

under this section. Antecedent parties means antecedent in liability and each joint indorser is an antecedent party as to his part of the debt. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350, S. C. secs. 66, 68, 152, 184.

Sec. 108. Where Notice Must Be Sent.

Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: [1]

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; [1] or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; [1] or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.[1]

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.[1]

Albany Trust Co. v. Frothingham, 50 Misc. Rep. 598, 99 N. Y. Supp. 343; Hussey v. Sutton, 96 Misc. Rep. 552, 160 N. Y. Supp. 934, S. C. sec. 193.

A notary's certificate of notice of protest, being by statute *prima facie* evidence of the facts therein stated, and in the absence of contradictory proof, conclusive, it is not necessary to show, in addition, that the notice was sent to a proper place, even though there was evidence that it was mailed to a certain post office station. This will be presumed to be the right place in the absence of contradictory evidence. Scott v. Brown, 240 Pa. 328, 87 Atl. 431.

The indorser lived at the place where the note was dated, but moved from said place at some time not stated. *Held*, that notice of dishonor mailed to said place was sufficient, the court assuming that there had been no change of residence up to that time. Mohlman v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046.

[1] Not in B. E. A.

Notice addressed to an indorser at a place which at the time of the execution of the note was stated by him to be his residence, is sufficient. Archuleta v. Johnston, 53 Colo. 393, 127 Pac. 134, S. C. sec. 75.

Defendant indorsed a note, made payable in New York City without adding an address. Upon dishonor the notary spent three-quarters of an hour in inquiring of the maker and of several other persons likely to know defendant's address, but without success, and then mailed the notice to an address given in the last issue of a standard city directory, but the defendant having moved to another street and number never received the notice. *Held,* as a matter of law sufficient diligence on the part of the notary and that defendant was not discharged. McGrath v. Fancolini, 92 Misc. Rep. 359, 156 N. Y. Supp. 981.

The maker of a note, who added an address to his signature, also indorsed the note after the indorsement of defendant, and in the presence of defendant added a different address to his signature as indorser. *Held,* from these facts and other circumstantial evidence, that the jury were warranted in finding that the purpose of the maker in adding an address when he indorsed the note, was to designate the place to which notice to defendant should be sent, and that defendant ratified the act and adopted the address as his own. Lankonfsky v. Raymond, 217 Mass. 98, 104 N. E. 489.

Notice of dishonor, mailed to the place of business of a corporation in which the indorser was a director and stockholder, but not shown to have been received, is not sufficient in the absence of proof that the indorser had his office and received his mail there. But it is sufficient if the office of the corporation is the place of business of the indorser (in this case the treasurer of the corporation). Knight v. Infantry Hall Auditorium Co., 35 R. I. 383, 87 Atl. 165, 195; *In re* Mandelbaum, 80 Misc. Rep. 475, 141 N. Y. Supp. 319, S. C. sec. 115.

Notice of protest addressed merely, "Clarence Hartman, New York City, New York," is not sufficient where there is no evidence that the indorser lived or ever had lived, or was sojourning in New York, or that any inquiry was made to ascertain the fact. Fonseca v. Hartman, 84 N. Y. Supp. 131.

The indorser of a promissory note, not having added an address after his indorsement, notice of dishonor addressed to him, "New York City," was sufficient under section 108(1), although his street address could have been found by consulting the telephone directory. McGrath v. Francolini, 156 N. Y. Supp. 980. In this case is a *dictum contra* to McGrath v. Francolini, 92 Misc. Rep. 359, 156 N. Y. Supp. 981, *supra,* "if the holder goes further and attempts to add a particular address, he takes the risk that the address so chosen may be wrong, in which event the statute gives him no protection." But the court cited only cases on instruments made prior to the enactment of the Negotiable Instruments Law.

Plaintiff, the payee of a dishonored note, knew that the defendant indorser lived in New York City, but claimed that he did not know his address. Defendant testified that plaintiff had frequently corresponded with defendant at his New York address. The notice of dishonor was mailed to defendant in the care of the maker, but not delivered to defendant. *Held*, that this was not sufficient notice, and that defendant was discharged. E. I. Dupont, etc., Powder Co. v. Rooney, 63 Misc. Rep. 344, 117 N. Y. Supp. 220.

Notice to an indorser, who has added no address to his signature, mailed to the post office of his place of residence, is good, but not if addressed to a house where the indorser does not reside or do business or receive his letters, even though he owned the house and his sons did business there. Ebling Brewing Co. v. Reinheimer, 32 N. Y. Misc. Rep. 594, 66 N. Y. Supp. 458.

Where a notary inquired of several persons as to the post office address of an indorser, all of whom seemed to have some information and stated their belief that a certain town was the nearest town to the farm where the indorser lived, and a much larger place than the town where the indorser actually received his mail, a notice of dishonor sent to such nearest town was sufficient, although the indorser did not receive it within a reasonable time. Vogel v. Starr, 132 Mo. App. 430, 112 S. W. 27. The N. I. L. was not cited in this case.

Sec. 109. Waiver of Notice.

Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Torbert v. Montague, 38 Colo. 325, 87 Pac. 1145, S. C. sec. 82-3; Sweetser v. Jordan, 216 Mass. 350, 103 N. E. 905, S. C. sec. 82-3; Jordan v. Reed, 77 N. J. L. 584, 71 Atl. 280, S. C. sec. 115; J. W. O'Bannon Co. v. Curran, 129 App. Div. 90, 113 N. Y. Supp. 359, S. C. sec. 82-3; First Nat. Bank v. Baker, 163 App. Div. 72, 148 N. Y. Supp. 372, S. C. sec. 70; Moll v. Roth Co., 77 Ore. 593, 152 Pac. 235, S. C. sec. 82-3; Gleeson v. Lichty, 62 Wash. 656, 114 Pac. 518, S. C. sec. 82; Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S. E. 342, S. C. sec. 89.

The facts constituting waiver must be alleged and proved. Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113, S. C. secs. 70, 82-3; Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481, S. C. sec. 82-3.

If presentment for payment be waived (see sections 82 and 83) notice of dishonor is dispensed with. Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. sec. 64-1; Hall v. Crane, 213 Mass. 326, 100 N. E. 336, citing only section 89, *contra.*

But a waiver of "notice of presentment, dishonor, and protest," is not a waiver of presentment. Hayward v. Empire State Sugar Co., 105 App. Div. 21, 93 N. Y. Supp. 449, S. C. sec. 82; Thompson v. Curry, 79 W. Va. 771, 91 S. E. 801, *semble, contra.*

Where an indorser, knowing he was discharged from liability for want of proper notice of dishonor, promised that if the maker does not pay the note, he will, he waives his discharge. The N. I. L. was not cited. Richardson v. Kulp, 81 N. J. L. 123, 78 Atl. 1062.

An indorser who, after the time for giving notice of dishonor, declares his intention to pay the note, waives notice of dishonor, whether he had knowledge of his discharge by failure to give notice or not, and no consideration is necessary to support a waiver. Thompson v. Curry, 79 W. Va. 771, 91 S. E. 801; Burgettstown Nat. Bank v. Nill, 213 Pa. 456, 63 Atl. 186, 3 L. R. A. (N. S.) 1079n., 110 Am. St. Rep. 554; Doherty v. First Nat. Bank, 170 Ky. 810, 186 S. W. 937, S. C. secs. 96, 100, 102.

But see, Aebi v. Bank of Evansville, 124 Wis. 73, 81, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925, S. C. sec. 186, that the indorser must have knowledge of the material facts as to his discharge. See also, Keith v. Burke, 1 Cababe & Ellis, 551, S. C. sec. 82-3.

A waiver of notice of dishonor may be implied by any conduct or words of the indorser whereby the holder is reasonably induced to believe that such waiver is intended and this is a question for the jury. Linthicum v. Bagby, 131 Md. 644, 102 Atl. 997, S. C. sec. 14; Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 N. E. 636, S. C. secs. 79, 82, 152.

But waiver of notice will not be inferred from doubtful acts or language of the indorser. Worley v. Johnson, 60 Fla. 294, 53 So. 542, 33 L. R. A. 641, S. C. sec. 82-3.

Plaintiff, an indorser of a check deposited by him with defendant bank, was not given due notice of its dishonor. With knowledge thereof, plaintiff gave his own check for the dishonored check and sued defendant for its failure to give him due notice of such dishonor. *Held,* that plaintiff had waived the bank's laches and could not recover. Weil v. Corn Exchange Bank, 63 Misc. Rep. 300, 116 N. Y. Supp. 665. *Quaere,* whether section 109 has any application to the case. See dissenting opinion of Lehman, J.

A mere oral promise to renew a note, made after its maturity by an accommodation indorser, is not a waiver of the failure to give notice of dishonor; such promise is not an acknowledgment of liability. Mechanics' and Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439, S. C. secs. 63, 196.

Defendant was one of several payees and indorsers of a note. Some days before its maturity defendant indorsed a renewal note having also several payees. The maker struck out the name of one

of the payees in the renewal note and substituted his own name as payee, and several days after maturity of the original note took it up by the renewal note. *Held,* that defendant had not waived notice of dishonor of the original note and was not liable on it. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4, 123, 124.

Before maturity of a note the indorser was notified that the note was due and unpaid and that he would be held liable. He refused payment and told the holder to exhaust the maker's security and said that he would resist an attempt to collect it from him. *Held,* not a waiver of proper notice of dishonor. The N. I. L. was not cited. Porter v. Moles, 151 Iowa, 279, 131 N. W. 23.

Where the indorser of a note paid the holder, both being under the mistaken impression that the note was payable June 3d instead of May 3d, the indorser may recover back the payment on the ground that the holder's failure to protest the note at maturity discharged the indorser. The N. I. L. was not cited. Isaacs v. Kobre, 145 N. Y. Supp. 919.

Defendant, payee of a note, sold and indorsed it to plaintiff, waiving demand, notice and protest. *Held,* no defense that defendant could not read and write, and intended merely to sign his name in blank, unless the indorsee knew these facts. The N. I. L. was not cited. First Nat. Bank v. Soltz (Mo. App.), 183 S. W. 675.

The indorser at the time of negotiation promised the indorsee to look after the note and that the money would be in his hands, and on the day of maturity again promised to look after the note. *Held,* that the indorser had waived presentment and notice of dishonor. Dillon v. Brion, 96 Kan. 189, 150 Pac. 553.

A note had a printed form on the back as follows: "The within note is hereby indorsed and demand, notice of non-payment and protest waived." Several persons before delivery to the payee consecutively signed in blank under this form. *Held,* that the waiver bound all alike, not merely the first indorser. Central Nat. Bank v. Sciotoville Co. (W. Va.), 91 S. E. 808.

Where a note contains a stipulation that the drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment, the indorser is unconditionally liable and in this sense becomes an unconditional debtor. Atkins v. Dixie Fair Co., 135 La. 622, 65 So. 762.

An indorser who by the terms of the note consents to any extension that may be granted and waives notice of such extension, waives notice of non-payment and dishonor at the end of this extension. First Nat. Bank v. Johnston, 169 N. C. 526, 86 S. E. 360, L. R. A. 1916B, 941. *Sed quaere?* The reasoning of Clark, C. J., dissenting to the contrary, seems more logical and satisfactory than that of the majority.

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A bill was drawn by the A Company to its own order on the B Company and accepted and indorsed to the C Company. All

three companies knew that the bill would be dishonored. No notice of dishonor was given to the drawer, because the secretary of the C Company, who was also secretary of the other two companies, knew it never was intended to make the drawer liable. *Held*, that it was not the duty of the secretary of the C Company to communicate his knowledge of the dishonor to the drawer, that his knowledge was therefore not notice to the drawer, and that the latter was discharged. *In re* Fenwick [1902], 1 Ch. 507.

Sec. 110. Whom Affected By Waiver.

Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.[1]

Mactavish's Judicial Factor v. Michael's Trustees [1912], Session Cases, 425, S. C. sec. 82-3.

A note contained in the body the following clause, "The parties hereto, including the makers and indorsers of this note, hereby waive presentment for payment, notice of non-payment, protest, and notice of protest, and diligence in bringing suit against any party thereto, either maker or indorser." *Held*, that this waiver was a part of the contract of the indorser, as well as of the maker, and that an accommodation indorser thereby waived the statutory right to require the creditor to sue the principal debtor within a certain time. The N. I. L. was not cited. Owensboro Savings Bank v. Haynes, 143 Ky. 534, 136 S. W. 1004.

Sec. 111. Waiver of Protest.

A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor.[2]

Bank of Montpelier v. Montpelier Lumber Co., 16 Idaho, 730, 102 Pac. 685; Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 N. E. 636, S. C. secs. 79, 82, 109, 152; Atkinson v. Skidmore, 152 Ky. 413, 153 S. W. 456.

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[1] Not in B. E. A.
[2] Not in B. E. A.

A waiver of protest written on the face of a negotiable promissory note before it was indorsed, is deemed to be a waiver on the part of an indorser, not only of a formal protest, but also of presentment and notice of dishonor. Frank-Taylor-Kendrick Co. v. Voissement, 142 La. 973, 77 So. 895.

An allegation in the declaration that the defendant "waived demand, protest and notice of demand, non-payment and protest," is not an allegation of a conclusion of law. Williams v. Peninsular Grocery Co. (Fla.), 75 So. 517, S. C. secs. 30, 66, 120-6.

Sec. 112. When Notice is Dispensed With.

Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

Fonseca v. Hartman, 84 N. Y. Supp. 131, S. C. sec. 108; Mohlman v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046, S. C. sec. 108; Reed v. Speer, 107 App. Div. 144, 94 N. Y. Supp. 1007, S. C. secs. 76, 89, 96; Siegel v. Dubinsky, 56 Misc. Rep. 681, 107 N. Y. Supp. 678; McGrath v. Francolini, 92 Misc. Rep. 359, 156 N. Y. Supp. 981, S. C. sec. 108.

Reasonable diligence depends upon the circumstances of the case, and is a question for the jury. Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, S. C. sec. 25.

But when the facts are undisputed, reasonable diligence is a question of law. Plaintiff, an indorser who has been notified of the dishonor of the note and, being ignorant of the address of defendant, a prior indorser, sent a notice addressed to him in care of the maker with whom plaintiff understood defendant sometimes stayed, but the notice never reached the defendant. *Held,* that there was not due diligence to ascertain defendant's residence. A junior indorser should inquire of the other parties for information. Two judges dissented. The N. I. L. was not cited. University Press v. Williams, 48 App. Div. 188, 62 N. Y. Supp. 986.

The notary testified that he mailed notice of dishonor, the contents of which were not of record to the indorser at a certain address in the city, that he did not know whether he looked for the indorser's address in a city or telephone directory. The indorser testified that he never lived, did business or received mail at this address. *Held,* not the exercise of such reasonable diligence as to dispense with notice of dishonor. Mechanic v. Elgin Iron Works, 98 Misc. Rep. 620, 163 N. Y. Supp. 97 S. C. sec. 63.

Notice of dishonor addressed to a town where the indorser had never lived, and which was not received, is ineffective to charge the indorser.

Where the maker of the note was a brother of the holder, and the only inquiry the latter made to discover the residence of an indorser was at the place where the indorser had formerly worked, this was not sufficient diligence to dispense with notice. Plaintiff should, at least, have applied to the other parties to the note for information. Silver v. Loucheim, 84 Misc. Rep. 234, 147 N. Y. Supp. 29.

Sec. 113. Delay in Giving Notice—How Excused.

Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder,[1] and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Price v. Warner, 60 Ore. 7, 118 Pac. 173, S. C. secs. 96, 103.

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Delay in giving notice of dishonor caused by the necessity of making inquiries as to the address of the party to be notified is excusable, the holder being ignorant of the address. The Elmville [1904], P. 319.

Failure, after the exercise of reasonable diligence, to find the drawer of a dishonored bill at the address given by him, does not dispense with notice if an address at which he is to be found comes to the holder's knowledge before action brought. Studdy v. Beesty, 60 L. T. Rep. 647.

Sec. 114. When Notice Need Not Be Given to Drawer.

Notice of dishonor is not required to be given to the drawer in either of the following cases:—

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. When the drawer is the person to whom the instrument is presented for payment;

[1] B. E. A. s. 50 (1) uses "party giving notice" instead of "holder."

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;[1](*a*)
5. Where the drawer has countermanded payment.(*b*)

Scanlon v. Wallach, 53 Misc. Rep. 104, 102 N. Y. Supp. 1090, S. C. sec. 89; Abraham v. Sabbatino, 102 Misc. Rep. 511, 169 N. Y. Supp. 40.

Defendant gave a check which was duly presented to the drawee bank and dishonored, for what reason did not appear. Notice of dishonor was not given to defendant for fourteen days thereafter. *Held,* that the failure to give notice is dispensed with only under defined circumstances, and that the burden is on the holder of the check, or one claiming under him, to excuse the failure to give notice. Cassel v. Regierer, 114 N. Y. Supp. 601.

A complaint on a check, alleging that when it was presented for payment to the defendant, who was the drawer, he refused to pay, is not demurrable for failure to allege notice of dishonor to the defendant. Adler v. Levinson, 65 Misc. Rep. 514, 120 N. Y. Supp. 67. The case does not show whether the complaint stated that presentment for payment was made to the drawee nor why it was presented to the drawer.

X gave his note in part payment of a store. Thereafter X sold the store to defendant, and defendant, for consideration, signed X's note as maker. *Held,* that X became a co-maker of the note and as such was not entitled to notice of dishonor. Boand v. Stewart (Mo. App.), 188 S. W. 317.

(*a*) The payee of a note took judgment against the maker. The payee then indorsed the note and transferred it to the plaintiff, who sued the payee on his indorsement without making demand on the maker. *Held,* that the note was merged in the judgment so far as concerned the maker, that the defendant had no right to expect that it would be paid if presented, and that he was liable without demand and notice. The N. I. L. was not cited on this point. Hawkins v. Wiest, 167 Mo. App. 439, 151 S. W. 789.

(*b*) An allegation that payment of a check had been countermanded is sufficiently set out where the check was set forth with the indorsement across the face, "Pyt. stopped." National Copper Bank v. Davis Co. Bank, 47 Utah, 236, 152 Pac. 1180.

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[1] "Where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill." B. E. A. s. 56 (2) (c) (4).

Sec. 115. When Notice Need Not Be Given to Indorser.

Notice of dishonor is not required to be given to an indorser in either of the following cases:—

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;(*a*)
3. Where the instrument was made or accepted for his accommodation.(*b*)

McDonald v. Luckenbach, 170 Fed. Rep. 434, 95 C. C. A. 604, S. C. sec. 63.

Where a deed of trust of all the property of the maker of a note was made to a third person to secure an anomalous indorser of the note, it was held, that the indorser could be charged without any prior demand on the maker, as the indorser had become the principal debtor. Section 115 was not cited. *In re* Aldred's Estate (No. 1), 229 Pac. 627, 79 Atl. 141, S. C. sec. 64. See criticism of this case in 24 Harvard Law Rev. 665, 669, and see 2 Ames' Cases Bills & Notes, 515, 518, n. 2.

Neither the receipt by defendant, with others of property of the maker of a note on an agreement to take care of the note at maturity, nor an admission that defendant, with others, was responsible for the note, will support an action against defendant alone on the ground that such receipt of property or such admission is a waiver of presentment and notice of dishonor or an excuse therefrom. Jordan v. Reed, 77 N. J. L. 584, 71 Atl. 280.

The bankruptcy of the maker does not dispense with notice to the indorser. *In re* Mandelbaum, 80 Misc. Rep. 475, 141 N. Y. Supp. 319, S. C. sec. 108.

(*a*) Westinghouse Electric, etc., Co. v. Hodge, 181 Mo. App. 232, 167 S. W. 1186; *In re* Swift, 106 Fed. Rep. 65, S. C. secs. 64-1, 82-3.

(*b*) Bergen v. Trimble (Md.), 101 Atl. 137, S. C. sec. 80.

A stockholder of a corporation, who indorsed, before delivery, a note made by another stockholder, to raise money for the corpora-

tion, is not entitled to notice of dishonor, because the instrument was really for his benefit. Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390, S. C. *supra*, sec. 64.

This case is clearly wrong, and in Nolan v. Wilcox Co., 137 Tenn. 667, 195 S. W. 581, S. C. secs. 63, 64, the court refused to follow it, and it must be regarded as overruled upon the point indicated. See also, other cases *contra* to Mercantile Bank v. Busby, cited under section 63, *supra*, pp. 234-235.

A demurrer to a complaint, which did not allege notice of dishonor to an indorser but did allege that payment was demanded of him, was properly overruled. Upon the trial plaintiff failed to prove presentment to the indorser so that the complaint alone was not sufficient to admit of evidence to prove that notice of dishonor was either given or waived. But as the answer alleged that notice of dishonor had not been given and that it had not been waived and these allegations were denied by the replication, it was held that the defect in the complaint was cured. De La Vergne v. Globe Printing Co., 27 Colo. App. 308, 148 Pac. 923, S. C. secs. 75, 104-2.

Sec. 116. Notice of Non-Payment Where Acceptance Refused.

Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Sec. 117. Effect of Omission to Give Notice of Non-Acceptance.

An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

The Wisconsin Act adds this inconsistent provision "but this shall not be construed to revive any liability discharged by such omission." (See Dunn v. O'Keefe, 5 M. & S. 282.)

Sec. 118. When Protest Need Not Be Made—When Must Be Made.

Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

In Vermont the following words are added to the section: "But the provisions of this section shall not be held to dispense with demand and notice of dishonor as provided by sections 71 and 90."

For definition of a foreign bill, see section 129. For provisions as to protest, see sections 152-160.

Sherman v. Ecker, 56 Misc. Rep. 216, 110 N. Y. Supp. 256, S. C. sec. 89; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, S. C. secs. 152, 185; Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, S. C. secs. 132, 137; American Nat. Bank v. Nat. Fertilizer Co., 125 Tenn. 328, 143 S. W. 597, S. C. secs. 63, 96, 97.

The mere fact of a protest is not conclusive upon the dishonor of the instrument and due notice to the indorser; other evidence is competent on these questions and they must be left to the jury. Where no formal protest is necessary, and defendant admitted having received notice of dishonor, and did not ask to have the questions of presentment and payment submitted to the jury, he was not aggrieved by the court allowing the notary to amend his certificate of protest by annexing his seal or by the admission of his certificate in evidence. Demelman v. Brazier, 198 Mass. 458, 84 N. E. 856, S. C. sec. 55.

In many states statutes make the certificate of the notary *prima facie* evidence of the facts of presentment, demand, nonpayment and notice of dishonor. Therefore, while protest is not required in cases of promissory notes and inland bills, it is usual to protest these instruments also, when dishonored, since the notary's certificate of protest is the most convenient and certain mode of proving the facts. Eaves v. Keeton (Mo. App.), 193 S. W. 629, S. C. secs. 63, 68; Scott v. Brown, 240 Pa. 328, 87 Atl. 431.

ARTICLE VIII.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Sec. 119. Instrument—How Discharged.

A negotiable instrument is discharged:—

1. By payment in due course by or on behalf of the principal debtor;(*a*)
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;(*b*)

3. By the intentional cancellation thereof by the holder;[1](*c*)
4. By any other act which will discharge a simple contract for the payment of money;[2](*d*)
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.(*e*)

The Illinois Act omits subsection 4.

The cases and discussions under sections 119 and 120 should be considered together.

In Tennessee it has been held that Shannon's Code, section 3517, providing that a surety may be discharged from liability by giving to the holder of the note thirty days' written notice to sue; and section 3522, providing that a surety may be discharged from liability by the principal debtor procuring a stayor to stay the judgment, in so far as they conflict with the later enactment of the Negotiable Instruments Law were repealed by that act. Graham v. Shephard, 136 Tenn. 418, 189 S. W. 867.

Section 1058, Revised Laws of Oklahoma, 1910, reads as follows:

"A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

Held, that this section is not in conflict with the provisions of the Negotiable Instruments Law (adopted in 1909), but is an enlargement of the grounds for discharge enumerated under sections 119 and 120 of said law. National Bank of Poteau v. Lowrey (Okla.), 157 Pac. 103.

In an action by the indorsee against the maker the answer alleged that before maturity the payee delivered to the indorsee and the indorsee accepted a mortgage in full payment of the note. The evidence was conflicting as to whether the mortgage was delivered and accepted as collateral, or as payment with an agreement by the indorsee to return the note to the payee. *Held,* that it was an error to direct a verdict for the indorsee. Royal Bank v. Goldschmidt, 51 Misc. Rep. 622, 101 N. Y. Supp. 101. *Sed quaere?* The indorsee was still the holder. The note was not discharged in either event, and the maker was merely setting up the *jus tertii,*

[1] "(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged." B. E. A. s. 63 (1).

[2] Not in B. E. A.

not any right of his own. See Twelfth Ward Bank v. Brooks, 63 App. Div. 220, 71 N. Y. Supp. 388, S. C. sec. 121.

The modes of discharge of a person primarily liable mentioned in this section are exclusive. Hence a plea that one of the makers to the knowledge of the payee-holder signed a note as surety only and had been discharged by an extension of time by the payee to the principal debtor is bad. Vanderford v. Farmers' Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, S. C. sec. 120-6. An accommodating maker who places the word "surety" after his signature is not discharged by an extension of time given without his consent to the co-maker. Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997. So also, where time was given to an accommodated payee by a holder, with knowledge of the accommodation, it was held that the accommodating maker was not discharged. National Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422, affirmed in 178 N. Y. 464, solely on the ground that no consideration for the agreement for extension had been alleged or proved.

Cowan v. Ramsey, 15 Ariz. 533, 140 Pac. 501 (accommodation maker); First Nat. Bank v. Livemore, 90 Kan. 395, 133 Pac. 734, 74 L. R. A. (N. S.) 274, *semble* (accommodation maker); Citizens' Bank v. Bowden, 98 Kan. 140, 157 Pac. 429 (accommodation maker); Fritts v. Kirchdorfer, 136 Ky. 643, 124 S. W. 882, *semble* (surety co-maker); First State Bk. of Nortonville v. Williams, 164 Ky. 143, 175 S. W. 10 (accommodation maker); Elsey v. People's Bank, 168 Ky. 701, 182 S. W. 873 (surety maker). Creditor surrenders to principal debtor securities pledged for payment of the note; Jamesson v. Citizens' Nat. Bk., 130 Md. 75, 99 Atl. 994, S. C. secs. 29, 122 (surety maker); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525 (accommodation maker); Lane v. Hyder, 163 Mo. App. 688 (surety maker); Richards v. Market Exchange Bank Co., 81 Oh. St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99, S. C. sec. 124 (surety co-maker); Cleveland Nat. Bk. v. Bickel (Okla.), 159 Pac. 302 (surety co-maker); Lumbermen's Nat. Bank v. Campbell, 61 Ore. 123, 121 Pac. 427 (surety co-maker); Murphy v. Panter, 62 Ore. 522, 125 Pac. 292 (accommodation maker); Hunter v. Harris, 63 Ore. 505, 127 Pac. 786, S. C. sec. 64 (accommodation maker); Graham v. Shepherd, 136 Tenn. 418, 189 S. W. 867 (accommodation maker); Wolstenholme v. Smith, 34 Utah 300, 97 Pac. 329 (surety co-maker); Bradley Engineering Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170, S. C. sec. 29 (surety co-maker).

It is submitted that the decisions in these cases are at variance with well established doctrines of suretyship. (See *infra*, p. 432, n. 2), and are not required by the provisions of sections 119 and 120. The discharge of a party, who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor seems to be covered by section 119-4. But if this is not so, then,

since the discharge of a surety-maker or surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this should be regarded as an omitted case and, therefore, to be governed by the law merchant under section 196.

That the rights of a surety do not depend on the form of the instrument, and that an acceptor or maker may be shown to have signed for the accommodation of a drawer or indorser and is therefore to be treated as a surety as against a holder with notice, see Chalmers, Bills of Exchange, 7th Ed. 241 *et seq.*

And that these decisions have not met with favor, see criticisms by Professor Street,[1] Hon. Amasa M. Eaton,[2] Professor Greeley,[3] Professor Hening,[4] and H. H. McMahon, Esquire.[5] See also an editorial by Professor McGehee in 12 Law Notes, 122, deploring the tendency toward a narrow literalism in interpreting the act. But the decisions are approved by Mr. Crawford.[6]

So far as concerns the questions involved in sections 119-120, there is no longer any hope of uniformity. Not only have several states made changes in these sections before adopting the act,[7] but in Iowa [8] it has been held that under section 58 providing that "in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable," a maker, known to the payee to be a surety, was discharged by an extension given to the principal maker without the consent of the surety, the court considering the provision of sections 119 and 120 as applicable only to holders in due course. So also in Missouri.[9] And the Court of Appeals of New York, having already declined in National Citizens Bank v. Toplitz, 178 N. Y. 464, *supra*, p. 313, to consider the effect of these sections in an action at law, held, that, even if it be assumed that in an action at law the makers of a note must arbitrarily be treated as primarily liable thereon, it does not prevent the court in an action in equity from determining and enforcing the rights of the parties as the same are found as a matter of fact. Therefore, where the accommodated payee of a promissory note discounted it at the defendant bank, which had knowledge of the facts, and the bank became insolvent before the note fell due, the court held, that, in a suit brought by the payee in equity to compel the receiver to offset his credit

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[1] 11 Law Notes 105.
[2] Reports of American Bar Association, 1907, p. 1164.
[3] 10 Ill. Law. Rev. 277.
[4] 59 U. of P. Law Rev. 532 *et seq.*
[5] 8 Ohio Law Reporter 25.
[6] Negotiable Instruments Law, 4th ed., 200.
[7] *Supra*, p. 312; *infra*, pp. 324, 325.
[8] Fullerton Lumber Co. v. Snouffer, 139 Iowa 176, 117 N. W. 50.
[9] Long v. Schaffer, 185 Mo. App. 641, 171 S. W. 691, S. C. sec. 30.

balance in the bank against the amount of the note, the receiver must do so, thus relieving to that extent the accommodation makers.[1]

There is really no more reason for abrogating the rule, which discharges a surety because a binding extension of time is given to the principal when the creditor is the holder of a negotiable note than in the case of any other form of contract, since in no case does the rule apply unless the creditor knows of the relation when he grants the extension. The negotiability of the instrument and its availability for circulation are therefore in no wise impaired. It is true that the rule has been criticised as being unfair to a creditor who is ignorant of the effect of his act, yet the rule has been almost universally adopted as the more equitable one. But, whatever may be said of the question where the prejudicial act is the giving of time, there can be no excuse for permitting the creditor to release the security given by the principal and yet to hold the surety. But even in this case sections 119 and 120 have been interpreted as giving this very right to the holder of a negotiable instrument even with knowledge of the suretyship, because such release of security is not specifically mentioned in the act as a cause of discharge of the instrument.[2]

In Kentucky it was at first held that a surety-maker was not discharged where the creditor surrendered to the principal debtor securities pledged for the payment of the note.[3] But this opinion was later overruled and it was held that where the note was in the hands of the payee, whom the court erroneously held could not be a holder in due course, the surrender without the knowledge or consent of the surety-maker of securities pledged by the principal debtor, discharged the surety.[4]

The confusion and ambiguities caused by these sections in attempting to deal with some cases of suretyship and omitting others, have been pointed out by Professor Hening,[5] and also by Professor Greeley.[6] The confusion is much increased by the absence of any definition in the act of the words "principal debtor" which are used both in section 119 and section 120. These words may mean either a party primarily liable or a party who, as between himself

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[1] Building & Engineering Co. v. Northern Bank, 206 N. Y. 400, 99 N. E. 1044; Knaffle v. Knoxville Banking Co., 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167, accord.

[2] German-American State Bank v. Watson, 99 Kan. 686, 133 Pac. 637, S. C. sec. 29. This is a logical, though monstrous result, of the unfortunate interpretation of these sections by the majority of the courts. It naturally follows also that sureties, who are primary parties to negotiable instruments, will be deprived of other equitable defences to which they have hitherto been entitled.

[3] Elsey v. People's Bank, 168 Ky. 701, 182 S. W. 873.

[4] Southern Nat. Life, etc., Co. v. People's Bank (Ky.), 198 S. W. 543, S. C. sec. 14.

[5] Hening, The Uniform Negotiable Instruments Law, 59 U. of P. Law Rev., pp. 532-547.

[6] Greeley, Uniform Negotiable Instruments Law, 10 Ill. Law Rev., p. 277.

and another party or parties to the instrument, ought to pay it. And it is not always clear in which sense they are used in these sections. Professor Hening argues that sections 120 and 192 should be totally repealed because, unless all defenses of the surety are codified, none should be, and that all can not be successfully codified owing to the diversity of the suretyship rules under both the decisions and the statutes of the different states. It would seem, however, that it is advisable in an act dealing with negotiable instruments to have some provision dealing with the modes of legal discharge of the instrument and of a party or parties, leaving the instrument otherwise still in force. It has therefore been suggested[1] that these sections be amended so as to read as follows:

Sec. 119. "A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the *person primarily liable;*
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. When the *person primarily liable* becomes the holder of the instrument at or after maturity in his own right."

Sec. 120. "*A party to a negotiable instrument* is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By a valid tender of payment made by a prior party."

As thus amended section 119 makes provision for the discharge of an instrument as a whole, while section 120 provides for the discharge of a party, whether he be primarily liable or secondarily liable, leaving the instrument otherwise in force. The words "principal debtor" are not used in section 119 in order to eliminate questions of suretyship from this section, leaving them to be dealt with as at common law.

The defendants were makers of a note payable July 1, 1909. Before the maturity of the note one of the makers made a contract with G and C whereby G and C assumed and agreed to pay the note when due. The next day G and C made a contract with X whereby X in turn assumed and agreed to pay the note. Said C, who was cashier of the plaintiff bank, the holder of the note, to induce X to assume its payment, agreed to extend the time of payment to September 1, 1909, and the plaintiff bank did so extend the time, without the knowledge and consent of the makers. *Held*, that sections 119 and 192 of the N. I. L. were inapplicable, since the relation of suretyship created by the said agreements arose independently of the original instrument, and that the makers were discharged by the said extension of time. Citizens' Bank of Senatti v. Douglas, 178 Mo. App. 664, 161 S. W. 601.

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[1] Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Rev., pp. 593-596.

Where defendants, surety-makers of a note, were assured by plaintiff, the holder, that he had sufficient funds of the principal debtor to satisfy all claims, and the holder extended the note, without defendant's consent, and defendants were prevented by such assurances from paying the note and pursuing the principal debtor, who was then solvent, the plaintiff was estopped from asserting the defendant's liability, the principal debtor having become insolvent. Bank of Neelyville v. Lee, 193 Mo. App. 537, 182 S. W. 1016.

A note with the mortgage securing it were assigned to one of the two makers. Before maturity said maker transferred the note and mortgage to A, writing upon the note, "The within note is hereby transferred and assigned without recourse on either of the makers individually, as shown by the assignment of the mortgage securing this note." The assignment on the mortgage was similar with the addition that the assignee "assumes and agrees to pay the said notes as between the makers thereof." *Held*, that the makers were relieved of personal liability to any subsequent holder of the note. Security State Bank v. Clarke, 99 Kan. 18, 160 Pac. 1149, S. C. sec. 25.

In Night & Day Bank v. Rosenbaum, 191 Mo. App. 559, 177 S. W. 693, it was held that an accommodating indorser is not discharged by a binding agreement of extension of time to the maker, without the consent of the indorser. This peculiar result is reached by holding an accommodation indorser to be a party primarily liable because section 29 makes an accommodation party, whether he is maker, drawer, acceptor or indorser, liable to a holder for value. But section 29 does not enact that all accommodation parties are liable as principal debtors or otherwise than according to the liability usually attached to their position on the paper. Such a construction of section 29 is also in the teeth of section 192, which defines the person "primarily" liable on an instrument as the person who, *by the terms of the instrument*, is absolutely required to pay the same and "all other parties are 'secondarily' liable." The two cases cited[1] by the court for its surprising proposition do not sustain it. In both of these cases the accommodating party was a maker and it was held in the one case, that such maker was not released by time given to the accommodated indorser, and in the other, that an accommodating maker was not released by time given to his accommodated co-maker.

Plaintiff bank held notes indorsed to it by the payee, who was the principal debtor. On the execution of the notes and before plaintiff acquired them, plaintiff knew that they had been made by defendant for the payee's accommodation. After the notes were due the plaintiff failed to apply to their payment the payee's deposit, which was sufficient to pay the notes. *Held*, that the accommodation maker was thereby discharged. The court did

[1] Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C 525; Wostenholme v. Smith, 34 Utah 300, 97 Pac. 329.

not decide whether this rule would apply if the case were brought within the Negotiable Instruments Law, because the notes having been made and being payable in Kentucky, were governed by the law of that state and it was not alleged or proved that the Negotiable Instruments Law was in force in Kentucky. Tatum v. Commercial Bank & Trust Co., 193 Ala. 120, 69 So. 508, S. C. sec. 29.

(*a*) Aurora State Bank v. Hayes-Eames Elevator Co., 88 Neb. 187, 129 N. W. 279, S. C. sec. 30.

The burden of proof of payment is on the defendant. Guano Co. v. Marks, 135 N. C. 59, 47 S. E. 127; Swan v. Carawan, 168 N. C. 472, 84 S. E. 699.

If an accommodation note after being once negotiated is paid at maturity by the accommodated party, it is thereby discharged and ceases to have any legal existence, at least as to the accommodation parties. Comstock v. Buckley, 141 Wis. 228, 124 N. W. 414, S. C. secs. 29, 58.

The receipt from an insolvent corporation of a preferential payment of an indorsed note, contrary to the statute, is in contemplation of law no payment at all and does not release the indorser. Perry v. Van Norden Trust Co., 118 App. Div. 288, 103 N. Y. Supp. 543, *semble;* Wright v. Gansevoort Bank, 52 Misc. Rep. 214, 103 N. Y. Supp. 548, *semble*. The N. I. L. was not mentioned in these cases.

A check was sent through the clearing house to the drawee bank for payment at 10 o'clock A. M., and because of notice that the drawer had failed, the drawee bank returned the check to the clearing house before 3 o'clock P. M., and a refund was made by the collecting bank to offset the credit given to it at the clearing house. *Held*, that, whether the check was returned according to the rules of the clearing house or not, it was not paid so as to discharge an indorser. Columbia-Knickerbocker Co. v. Miller, 215 N. Y. 191, 109 N. E. 179, S. C. sec. 186.

Plaintiff bank received payment from the drawee bank of a check forwarded to it by defendant bank, under an agreement between plaintiff and the drawee bank that checks should be paid immediately, subject to correction at any time during business hours of the same day. The defendant was ignorant of this agreement until after the reimbursement of the drawee. The check was returned in due time as worthless. Plaintiff reimbursed the drawee bank. *Held*, that defendant could not defeat reimbursement to plaintiff on the theory that the check had been paid. The N. I. L. was not cited. Seaboard Nat. Bank v. Central Trust & Savings Bank, 253 Pa. 412, 98 Atl. 607.

Secus where there was no such agreement between the collecting bank and the drawee bank. Monongahela Nat. Bank v. First Nat. Bank, 226 Pa. 270, 75 Atl. 359.

The defendant drew a check for good consideration payable to the order of X, who indorsed it, and it was in due course presented through the clearing house to the drawee bank for payment. In the meantime, the defendant stopped payment on the check, but the paying teller, by mistake, paid the check and failed to return it to the bank presenting it within the time permitted by the clearing house rules. Meanwhile, the defendant withdrew all his funds from the bank. The bank assigned the check to the paying teller. *Held,* that the check was not extinguished and that the teller could recover the amount of the check from the defendant. The N. I. L. was not cited. Usher v. Tucker Co., 217 Mass. 441, 105 N. E. 360.

The maker of a note fraudulently gave to the payee the money of the plaintiff, received the note and destroyed it. *Held,* that though the note was in form paid, the transaction was not in equity and justice a "payment in due course" within this section, and the maker and indorser are estopped, as against the plaintiff, whose money was so unlawfully used, to claim that the note was paid, the plaintiff being entitled to be subrogated to the rights of the holder of the note. Pittsburg-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N. E. 465, S. C. sec. 84.

One of three surety makers paid the note at maturity and had it assigned to his wife, who sued the principal and the other two sureties. *Held,* that the note was not extinguished. Whether a payment by a surety is an extinguishment or a purchase is a question of intention, and from an assignment to a third party the inference of an intention to keep the note alive is unmistakable. The N. I. L. was not cited. Pendergraft v. Phillips (Okla.), 156 Pac. 1189.

The maker of a note drew a check for the amount, payable to the order of a third person which was indorsed by the payee and delivered to the bookkeeper of the holder of the note with instructions to apply it on the note. The bookkeeper had previously conducted other transactions between the parties. He promised to apply the check as directed and return the note, but in fact applied the check on a general account. *Held,* that this was a sufficient defense to an action on the note. The N. I. L. was not cited. Rosenberg v. Segall, 159 N. Y. Supp. 152.

ENGLAND—

The payee of a demand note held a mortgage to secure the debt. He sold and transferred the mortgage to one person for full value and afterwards indorsed the note to a holder in due course. *Held,* that the note was not paid by the sale of the mortgage. Glasscock v. Balls, 24 Q. B. D. 13, S. C. sec. 88.

(*b*) Marling v. Jones, 138 Wis. 82, 119 N. W. 931, S. C. secs. 29, 52.

Plaintiff signed a note as co-maker with defendant for the accommodation of defendant, the note reading, "I promise to pay,"

and being, therefore, joint and several. Plaintiff paid the note at maturity and sued defendant on the note. *Held,* that plaintiff could recover on the note both the amount thereof and also the attorney's fees stipulated in the note which the payee would have been entitled to recover. Pease v. Syler, 78 Wash. 24, 138 Pac. 310.

The defendant made a note payable to the order of a third person for the accommodation of the plaintiffs, who indorsed the note "as sureties." The plaintiffs took up the note before maturity, and at maturity sued the defendant. *Held,* that the relations of the parties could be shown by parol evidence and that the note was discharged by the payment by the plaintiffs. Lamberson v. Love, 165 Mich. 460, 130 N. W. 1126.

(*c*) This section designates the acts which discharge the instrument and does not purport to describe the character of proof by which they must be established. A renunciation must therefore be in writing, under section 122, unless the instrument is delivered up to the party primarily liable thereon. Whitcomb v. National Exchange Bank, 123 Md. 612, 91 Atl. 689.

The holder of a note intentionally tore it up and threw it in the waste basket. *Held,* a discharge of the note. Montgomery v. Schwald, 177 Mo. App. 75, 166 S. W. 831.

Although stamping an instrument "Paid" or other cancellation is not conclusive evidence of discharge, yet, where a bank intentionally and not influenced by fraud, accepted its depositor's check on his account in payment of the note of a third party, marked the note "Paid" and surrendered it to the depositor, charged the check against the depositor's account and stamped it "Paid," the note was discharged, notwithstanding a check on another bank previously credited to the depositor's account turned out to be uncollectible, so that the depositor's account was insufficient to pay his check given for the note. Broad & Market Nat. Bank v. N. Y. & E. Realty Co., 102 Misc. Rep. 82, 168 N. Y. Supp. 149. See other cases under sections 87 and 136 as to the effect of marking an instrument "Paid."

One M made a note to J who deposited it in the O bank for collection, which sent it to the C bank for collection. M drew a draft on plaintiff to the order of his agent W, who deposited it in the C bank for collection with instructions to credit the amount to M, or as he claimed, to apply it on the note. Plaintiff was induced by fraud of M to pay the draft, and the C bank placed the amount to M's credit. Discovering the fraud, plaintiff requested the C bank not to disturb the deposit until suit could be begun. Thereafter, W directed the C bank to apply the amount on the note and the cashier indorsed the note as "Paid" and charged the amount to M. The next day the cashier erased the indorsement of payment and credited the amount back to M. Plaintiff sued the O bank and garnished the C bank. *Held,* that plaintiff was

entitled to the money obtained by the payment of the draft and credited to M's account in the C bank. The N. I. L. was not cited. Oklahoma State Bank v. Bank of Central Arkansas (Ark.), 179 S. W. 509.

(*d*) AMES: Subsection 4 is a startling innovation and should be cancelled. Under it a payment before maturity will discharge the instrument, for such would be the effect as to a simple contract for the payment of money. Yet it has always been the case that if a negotiable instrument is transferred before maturity to a holder in due course the instrument is not discharged by such payment.

BREWSTER: Subsection 4 evidently relates to acts between the parties.

AMES: The subsection declares just the opposite. If a negotiable instrument is "discharged" the maker can never be charged upon it.

MCKEEHAN: Professor Ames' criticism is justified. Yet it is unbelievable that this subsection will be permitted to upset the rule that declares payment before maturity to be no defense against a holder in due course, although to limit the meaning of the subsection the courts will probably be obliged to take the ground that any other interpretation would be revolutionary, unjust and absurd.

Mr. McKeehan's prophecy was fulfilled in Manchester v. Parsons, 75 W. Va. 793, 84 S. E. 885, the court holding that although a literal interpretation of section 119-4 might indicate that payment to a prior holder will discharge a negotiable instrument in the hands of a holder in due course, yet such a construction would defeat section 57 and other provisions of the act and was clearly not intended. That the acts referred to in the subsection must be limited to such acts as relate to and affect the holder demanding payment.

Two persons as makers signed a promissory note reading (in part), "I promise to pay for machinery sold to both." The holder gave a written release to one of the makers. Article 2203 of the Civil Code declared that the "conventional discharge in favor of one of the co-debtors *in solido* discharges all the others unless the creditor has expressly reserved his rights against the latter." *Held,* that the makers were liable *in solido;* that section

122, N. I. L., does not abrogate nor repeal article 2203 of the Civil Code; also that section 119-4 does not define the act which will discharge a simple contract for the payment of money; therefore, according to section 196, the law merchant is applicable; that that law in this instance is article 2203 of the Civil Code and that the other maker was therefore discharged. J. I. Case Threshing Machine Co. v. Budger, 133 La. 754, 63 So. 319.

In Steele v. Bradley (Mo. App.), 186 S. W. 1171, it was argued that under section 119-4 where a note is assigned after maturity, and no notice of the transfer is given to the maker, and he thereafter pays the amount due to the original payee, it is thereby discharged. The court said that if the maker "paid the note without knowledge of the assignment there might be some merit in this contention." But as it had been found that the maker knew of the assignment the question was not decided.

(*e*) The plaintiff, the second indorser of a note, was requested by the defendant, the maker, on the day of maturity, to take up the note and defendant promised to pay him. Plaintiff paid the holder, but in some way defendant got possession of the note without having paid it. *Held,* that defendant was not a holder in his own right, that the instrument was not discharged and defendant was liable to plaintiff. Korkemas v. Macksoud, 131 App. Div. 728, 116 N. Y. Supp. 85.

A note was not discharged when the maker acquired it as agent for another. People's State Bank v. Dryden, 91 Kan. 216, 137 Pac. 928.

A was principal maker and B and C were sureties on a note. At maturity, A, with money furnished by the plaintiff and on behalf of plaintiff, paid the amount to the payee, who indorsed the note, without recourse, to the order of A, who delivered the note to plaintiff. *Held,* that this was a sale of the note, not a payment, that the note was not discharged and that plaintiff could hold the principal and the sureties. People's State Bank v. Dryden, 91 Kan. 216, 137 Pac. 928.

The indorser of a note is discharged when it is surrendered to the maker and cancelled by him after maturity in exchange for a renewal note, although the maker had altered the renewal note by striking out the name of one of the payees and substituting his own name. First Nat. Bank v. Gridley, 112 N. Y. App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 123.

The maker of a note is not discharged by the holder's acceptance of a new note in payment thereof if the new note proves to be invalid. The N. I. L. was not cited. Wade v. Hall (Okla.), 166 Pac. 720.

A town treasurer, being in default, issued notes of the town and used the proceeds to cover up his shortage. These notes, which were held to be valid, were indorsed to the plaintiff, who sur-

rendered them at maturity to the treasurer in exchange for renewal notes for the same amount. These renewal notes were forged and issued without authority by the treasurer. *Held*, that this did not operate to extinguish the original notes and that the plaintiff could recover on them from the town. The N. I. L. was not cited. Bass v. Wellesley, 192 Mass. 526, 78 N. E. 543.

A demand note is discharged when the holder upon payment of a part surrenders the note to the maker, although the maker promised at the time to pay the balance. Schwartzman v. Post, 84 N. Y. Supp. 922, 94 App. Div. 474, 87 N. Y. Supp. 872.

The defendant and another signed a note as co-makers with S for S's accommodation, payable to the order of a bank. At the maturity of the note S paid the amount of the note to the bank with a check drawn by his wife on funds placed to her credit by S in another bank. The note was then transferred to S's wife. *Held*, that the note was discharged and that she could not recover from the defendant thereon. The N. I. L. was not cited. Hagin v. Shoaf, 9 Ala. App. 300, 63 So. 764.

The maker of a past due note secured by mortgage authorized a third person to buy the note and mortgage from the holder, who transferred them to the agent for a less sum than the amount due. The agent released the mortgage and transferred the note to the maker who reimbursed the agent. *Held*, that the maker became the owner in his own right, although the holder believed the agent was buying for himself. Sigler v. Sigler, 98 Kan. 524, 128 Pac. 864, L. R. A. 1917A, 725.

A promissory note was transferred to the maker as collateral for a separate debt due the maker. *Held*, that the note was not thereby discharged. Owings Lumber Co. v. Marlowe (Ala.), 76 So. 926. A promissory note coming into the hands of the maker in due course is *ipso facto* extinguished. Yet, if the maker thereafter transfer the note it is revived as to him and with all of its securities is continued in force as a new and primary obligation. *Ib.* The N. I. L. was not cited in this case.

ENGLAND—

"In his own right" is not used merely in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.

A gave a demand note payable to B or order on the understanding that it should not be negotiated. B, however, indorsed the note for value to C. Afterwards A paid B the amount of the note. B then obtained the note from C by fraud and gave it to A. *Held*, that A was not a holder for value, the previous payment not being a consideration given when he received back the note, and he is still liable to C on the note. Nash v. De Freville [1900], 2 Q. B. 72.

Sec. 120. When Persons Secondarily Liable on—Discharged.

A person secondarily liable on the instrument is discharged:—

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;[1](*a*)
3. By the discharge of a prior party;[2](*b*)
4. By a valid tender of payment made by a prior party;[2](*c*)
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;[2](*d*)
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.[3](*d*)

The Illinois Act omits subsection 3.

The Missouri Act adds to subsection 3, "except when such discharge is had in bankruptcy proceedings."

The Wisconsin Act interpolates a new subsection as follows: "4a. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

The Illinois Act adds to subsection 5 (Illinois subsection 4) the words "or unless the principal debtor be an accommodating party."

The Illinois Act substitutes in line one of subsection 6 (Illinois subsection 5) the word "an" for "any" and interpolates

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[1] "Any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged." B. E. A. 63 (2).

[2] Not in B. E. A.

[3] For a suggested amendment of this section to cure the defects pointed out by Professor Ames, see Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Rev. 594.

"in favor of the principal debtor" after "agreement" in line one and interpolates "prior or subsequent" after "assent" in line four and adds "or unless the principal debtor be an accommodating party" at the end of the subsection.

The Wisconsin Act interpolates the words "prior or subsequent" after "assent" in line four of subsection 6 and adds the words "or unless he is fully indemnified" to the subsection.

The Maryland and New York Acts omit the words "unless made with the assent of the party secondarily liable, or" in subsection 6.

This section applies only to parties secondarily liable on the instrument and not to a maker, even though he be surety for a comaker. Niotaze State Bank v. Cooper, 99 Kan. 731, 162 Pac. 1169.

The payment for and receipt of a note by a stranger to it is presumptively a purchase and not a payment of the note. Cantrell v. Davidson, 180 Mo. App. 410, 168 S. W. 271; Wing v. Union Central Life Ins. Co., 181 Mo. App. 381, 168 S. W. 917. The N. I. L. was not cited in these two cases.

(*a*) No consideration is necessary to support a discharge by the intentional cancellation of a party's signature by the holder. McCormick v. Shea, 50 Misc. Rep. 592, 99 N. Y. Supp. 467, S. C. sec. 123.

(*b*) AMES: Subsection 3 is a mischievously revolutionary provision. Under it a discharge of the maker by the statute of limitations will discharge all indorsers; so, also, if a surety of a joint note dies; so if due notice should not be given to the first indorser all subsequent indorsers, although duly notified, would be discharged. Except for section 16 of the National Bankruptcy Laws the discharge in bankruptcy of a prior party would discharge an indorser. Even if the words "by the holder" were inserted, release of an accommodation maker by a holder with knowledge of the accommodation would discharge the accommodation indorser, a result shocking and contrary to all the decisions.

BREWSTER: This subsection evidently means a discharge of a prior party by the holder.

MCKEEHAN: Agrees with Professor Ames. The subsection seems to mean *any discharge:* a discharge by operation of law or a discharge by the holder. If the Commissioners meant only the latter, why did they not say so?

The Supreme Court of Oregon has adopted Judge Brewster's view, that section 120-3 applies only to a discharge by the act of the creditor, and therefore does not include discharges by operation of law, for example, bankruptcy, and does not embrace a situation where, after a trial on the merits, the note is in effect destroyed because of a vice inherent in the transaction. Everding v. Toft, 82 Ore. 1, 160 Pac. 1160, S. C. sec. 56.

In this case the maker was discharged by a judgment based on fraud in the note and bad faith on the part of the holder, and under this construction of section 120-3, the indorser would not be discharged by the discharge of the maker and therefore recourse to the general principles of suretyship was necessary in order to hold that the indorser was discharged. No answer was made to Dean Ames' other illustrations, *viz.*, the discharge of a first indorser by the act of the holder in failing to give him notice of dishonor, which discharge would, under this subsection, entail the discharge of subsequent indorsers, although they had had due notice, and the illustration of the discharge of an accommodation maker by a holder knowing of the accommodation, which would discharge the accommodated indorser, although he is the party ultimately liable.

A composition in bankruptcy proceedings against the maker of notes does not discharge the indorsers, the release being effected by operation of law, and not by consent of the parties. The N. I. L. was not cited. Silverman v. Rubenstein, 162 N. Y. Supp. 733.

The holder of a note can sue the second indorser without first demanding payment of the first indorser. It is no defense to the action against the second indorser that the plaintiff agreed with the first indorser to proceed against the second indorser only. Bank of America v. Wilson, 186 Mass. 214, 71 N. E. 312.

Nor does the taking of security from the payee-indorser after dishonor and due notice to an anomalous indorser affect the holder's rights against the latter. The N. I. L. was not cited. Commercial Nat. Bk. v. Clarke, 180 Mass. 249, 62 N. E. 370.

(*c*) Payment by a surety on an appeal bond from a judgment against the maker and prior indorsers of a note discharges a subsequent indorser, so that the surety is not subrogated to the right of the judgment creditor against said indorser. State Bank v. Kahn, 49 Misc. Rep. 500, 98 N. Y. Supp. 858.

(*d*) AMES: There seems to be no sufficient reason, on the one hand, for inserting in a negotiable instrument code, the doctrines of suretyship in subsections 5 and 6, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance.

But subsections 5 and 6 are also inaccurate in point of law. Under them a release or an extension of time given by the holder

to an accommodating acceptor or maker would discharge the accommodated drawer or indorser, which would be inequitable and contrary to all the authorities. If these subsections are retained even in an amended form, another should be added to the effect that an accommodating acceptor or maker will be discharged if the holder with knowledge of the accommodation releases or gives time to the accommodated drawer or indorser. The authorities are almost unanimous on this point.

BREWSTER: Admits that the authorities are unanimous against the discharge of the party accommodated in the cases put by Professor Ames, but does not see how the subsections could be construed to cover such cases.

MCKEEHAN: Possibly the words "principal debtor" in subsection 5 do not mean the person "primarily liable" but the person ultimately liable. But subsection 6 evidently refers to an extension of time given to the person primarily liable. Professor Ames' illustration shows that this subsection is not wholly satisfactory, nor is subsection 5 if he is right in supposing it to apply to the person primarily liable on the instrument.

In view of Professor Ames' criticism on this section, the following amendment of section 120 has been suggested:

"Section 120. A party to a negotiable instrument is discharged:

(1) By any act which discharges the instrument.

(2) By the intentional cancellation of his signature by the holder.

(3) By a valid tender of payment made by a prior party."

And some argument in support of this amendment may be found in the same place.[1]

Walker v. Washington Title Ins. Co., 19 App. Cas. (D. C.) 575; Miners' Bank v. Rogers, 123 Mo. App. 569, 100 S. W. 534; Ziegfried v. Stein, 117 N. Y. Supp. 900; First Nat. Bank v. Diehl, 218 Pa. 588, 67 Atl. 897; Meredith v. Dibrell, 127 Tenn. 387, 155 S. W. 163, 46 L. R. A. (N. S.) 92, Ann. Cas. 1914B, 1079.

An offer to prove a change made by the cashier of a bank, holding a note, on which defendant claimed to be a surety, by altering to a later date a marginal notation of the due date made by the cashier when the note was discounted, and making a like change in the entry as to the maturity of the note in the bank's index book of notes, was rightly refused in the absence of evidence to show

[1] Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Rev. 594.

that these acts of the cashier were within his authority or were ratified by the bank. Vanderford v. Farmers' Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, S. C. sec. 119.

The negotiable quality of a promissory note, payable on or before a fixed day, is not destroyed by a provision that the maker and indorsers severally waive presentment and notice of protest, and consent that the time of payment may be extended without notice. First Nat. Bank of Pomeroy v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878. See also other cases cited under section 184 *infra,* pp. 390 *et seq.*

Subdivision 5 has no application where a release of the principal debtor is given by the holder at the request of the party secondarily liable, although the release is under seal and does not reserve any right against the party secondarily liable. Oral evidence is admissible to prove that such release was executed and delivered at the request of the indorser and upon his promise to remain responsible. Arlington Nat. Bk. v. Bennett, 214 Mass. 352, 101 N. E. 982.

The courts should not be over-particular as to the precise phraseology of the reservation of the right of recourse under this section so long as it may be reasonably construed as complying with the act. First Nat. Bank v. Delone, 254 Pa. 409, 98 Atl. 1042, *semble,* S. C. sec. 105.

A reservation of the right of recourse can not be implied from acts and conduct but must be express. Phenix Nat. Bank v. Hanlon, 183 Mo. App. 243, 166 S. W. 830. In this case it was held that where the payee received a part payment in full settlement and indorsed on the note a receipt in full settlement of the liability of the maker, the indorser was discharged, although he indorsed on the note his consent to the release of the maker.

The result is regrettable, and would surely not have been reached at common law. The indorser's consent was undoubtedly intended to waive any objection to the discharge of the maker without affecting his own liability, otherwise why should it be desired by the holder? The decision is supportable only on the theory that the case is not a *casus omissus* and therefore governed by section 196, because the fact that subsection 5 does not contain the additional clause found in subsection 6, "unless made with the assent of the party secondarily liable," may compel the inference that subsection 5 was intended to cover the whole matter of the effect of the release of the principal debtor upon the right of the recourse against the party secondarily liable.

The agreement may be express or implied, may be by parol or in writing, but must be a binding contract enforceable at law or in equity, supported by a valuable consideration and for a definite period. The burden of proving the agreement is on the indorser alleging it. If the facts and circumstances are all ascertained it is a question of law whether they constitute such an agreement.

In the absence of offered evidence of the intention of the maker

and holder the payment and acceptance of interest in advance is sufficient evidence of an intention to extend the time of payment. Cape Charles Bank v. Farmers' Mut. Exchange, 120 Va. 771, 92 S. E. 918.

In Second Nat. Bank v. Graham, 246 Pa. 256, *infra*, p. 330, it was also held that the receipt of interest in advance for a period beyond the maturity of a note is *prima facie* but not conclusive evidence of an agreement extending the time.

An indorser is discharged by an extension of time of payment to the maker made without the indorser's assent, no right of recourse having been preserved. Greenberg v. Ginsberg, 143 N. Y. Supp. 1017, 82 Misc. Rep. 415.

An agreement by the holder of a note not to press a suit begun against the maker while certain monthly payments continue to be made, discharges non-assenting indorsers. Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.), 847, S. C. sec. 64-1.

Defendant indorsed a note payable to plaintiff for the accommodation of the maker. Before maturity the maker sought an extension and agreed to give a series of notes falling due weekly. Plaintiff assented, provided the new notes were indorsed by the defendant. The defendant being absent, the maker was unable to procure his indorsements. It was then agreed between the plaintiff and the maker that the plaintiff should take the new notes and hold the old note as collateral until all the new notes were paid. *Held,* that the obligation of an indorser, as surety, is *strictissimi juris,* and that the defendant was discharged by the extension to the maker without the defendant's consent and without express reservation against him. Nat. Park Bank v. Koehler, 204 N. Y. 174, 97 N. E. 468.

A guarantor of payment of a negotiable instrument, not being by the terms of the instrument absolutely required to pay it (section 192) is only secondarily liable thereon; and an extension of time to the principal debtor without his consent operates under section 120, as under the former law, to release him from liability. Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888.

The defendant transferred the notes of third persons to the plaintiff in payment for land, and orally guaranteed the payment of the notes. The notes were dishonored and by agreement between the plaintiffs, the defendant and the makers, the latter were released on the transfer to the plaintiff's attorney of land mortgaged as collateral security for the notes. In a suit by the plaintiff against the defendant on his guaranty for an unpaid balance of the notes, *held,* that the release of the makers was no defense, a guarantor being after default in the payment of the note primarily, not secondarily liable. Frost v. Harbert, 20 Idaho, 336, 118 Pac. 1095, 38 L. R. A. (N. S.) 875.

A payee who wrote his name on the back of the note under a clause guaranteeing payment and waiving demand, notice of nonpayment and protest, becomes secondarily liable, under section 120, and is discharged by a binding extension of time given by the holder to the maker without the consent of the payee, notwith-

standing he knew of the extension, unless recourse against him was expressly reserved. Farmers' & Drovers' Bank v. Bashor, 98 Kan. 729, 160 Pac. 208.

That a renewal of a note worked an extension of time is immaterial where the note contained a provision that the sureties consented to extension of time for payment without notice. Aldrich v. Rowell (Iowa), 166 N. W. 88.

The renewal of notes *before* maturity imports an extension for the same period as the notes had to run originally, on the same terms, and releases sureties on the notes who do not consent to such renewal, in spite of a stipulation to the effect that an extension *after* maturity should not release the sureties. The N. I. L. was not cited. Edwards v. Goode, 228 Fed. Rep. 664, 143 C. C. A. 186.

Defendant indorsed a note signed by the maker, but otherwise blank, to be used as collateral to secure another note given by the maker to plaintiff bank. The principal note was several times renewed by the bank without the knowledge or consent of the defendant. *Held,* that the defendant was discharged. Union Trust Co. v. McCrum, 145 App. Div. 409, 129 N. Y. Supp. 1078, S. C. sec. 14.

In England, in the federal courts, in New York and in nearly all of the other states, a note given by a debtor to his creditor will not pay or extinguish the original claim unless so agreed between the parties. In Indiana, Maine, Massachusetts and Vermont the giving of the note extinguishes the debt unless the contrary is agreed upon. The N. I. L. was not cited. *In re* Wegman Piano Co., 221 Fed. Rep. 128.

The mere taking of another note as collateral for a note is not such an extension as will discharge an indorser. It is a question for the jury whether a new note taken after maturity of the original note was received as payment or only as collateral security. Second Nat. Bank v. Graham, 246 Pa. 256, 92 Atl. 198.

A plea merely alleging that plaintiff without the knowledge or consent of defendant indorser, extended the time of payment at the maker's request, is bad as failing to show a binding agreement to extend upon consideration. Nor is an averment that an agreement was made for some "good or valuable consideration" sufficient. Williams v. Peninsular Grocery Co. (Fla.), 75 So. 517, S. C. secs. 30, 66, 111.

Defendants as sureties executed a note to a bank which contained a clause that, "The principal may be granted further time, after due, from period to period, on payment of interest, without releasing sureties." After the note was due and unpaid the principal executed to the bank another note payable in four months for a larger amount covering all his indebtedness to the bank, including the amount due on said first note, which last note had a clause that the first note should "be held by the bank as collateral security." In an action on the first note, *held,* that the sureties were not discharged. Dies v. Wilson Co. Bank, 129 Tenn. 89, 165 S. W. 248, Ann. Cas. 1915A, 1090.

The holder of a note at maturity accepted from the maker sums of money required as discounts for renewal notes on condition that the maker should get renewal notes signed by the surety, who was ill, as soon as his condition would permit. *Held*, that this was not an agreement binding on the holder to extend payment whereby the surety was discharged. Hamilton Nat. Bank v. Breeden, 130 Tenn. 465, 171 S. W. 86, L. R. A. (N. S.) 1915C, 831.

The mere fact that plaintiff had said that he would take up the note and carry it, without fixing a definite time, did not prevent him from sueing at any time and did not release a surety who did not resort to the remedies afforded by Revisal 1905, sections 2271, 2846. Roberson-Ruffin Co. v. Spain (N. C.), 91 S. E. 361, S. C. sec. 192.

An extension of time granted on a principal note does not concern indorsers on other notes pledged as collateral and does not release such indorsers. The N. I. L. was not cited. Commercial Nat. Bank v. Sanders, 139 La. 622, 71 So. 891.

An agreement by the holder of a past-due note, that if the maker would pay a part of the note the holder would wait for the balance, is without consideration and not binding on the holder, and therefore does not relieve an accommodation indorser. Nalitzky v. Williams, 237 Fed. Rep. 802, 151 C. C. A. 44, S. C. sec. 29.

A release of one joint maker, the holder reserving his rights against all other parties, does not discharge the indorsers. Davis v. Gutheil, 87 Wash. 596, 152 Pac. 14, S. C. sec. 122.

An agreement by the holder of a note with a third party to extend the time of payment does not discharge the indorsers, since the words "agreement binding on the holder" means an agreement binding on the holder made with the principal debtor. Brosemer v. Brosemer, 99 Misc. Rep. 101, 162 N. Y. Supp. 1067.

If the payee of a note gives up collateral security from the maker, greater in value than the amount of the note, indorsers for the accommodation of the maker are thereby discharged. The N. I. L. was not cited. Brown Carriage Co. v. Dowd, 155 N. C. 307, 71 S. E. 721.

Where a holder of a note secured by a mortgage impairs the mortgage security he loses to the extent of the impairment his recourse against the indorsers. The N. I. L. was not cited. Interstate Trust & Banking Co. v. Young, 135 La. 465, 65 So. 611.

Under the Wisconsin additional subsection 4a *supra*, p. 324, it has been held that if the creditor gives up and applies to other purposes collateral security to an amount less than the debt, the surety is not discharged of his entire liability, but *pro tanto* only. State Bank of La Crosse v. Michel, 152 Wis. 88, 139 N. W. 748.

Although the surrender by the payee of security given by the maker without the knowledge or consent of the accommodation indorsers releases them if they insist thereon when it comes to their knowledge, yet if not doing so, they take up the old note and give new notes, they waive their right and are liable, no new

consideration being necessary. The N. I. L. was not cited. German National Bank v. Barber, 159 Wis. 109, 149 N. W. 767.

Sec. 121. Right of Party Who Discharges Instrument.

Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument,(*a*) except:—

1. Where it is payable to the order of a third person, and has been paid by the drawer; (*b*) and
2. Where it was made or accepted for accommodation, and has been paid[1] by the party accommodated.(*c*)

In the Arkansas Act, the last word of the section reads "accommodater," an evident misprint.

Berenson v. Conant, 214 Mass. 127, 101 N. E. 60, S. C. sec. 58; Carter v. Butler, 126 Mo. 306, 174 S. W. 399, Ann. Cas. 1917A, 483, S. C. secs. 28, 30; Polhemus v. Prudential Corporation, 74 N. J. Law, 570, 67 Atl. 303.

(*a*) In an action by the indorsee of a promissory note against an indorser, payment by a subsequent indorser is not a defense unless defendant can show that the payment was made for him. Twelfth Ward Bank v. Brooks, 63 App. Div. 220, 71 N. Y. Supp. 388.

Payment by an anomalous indorser extinguishes the note, and neither he nor his transferee can hold the maker on the note, for the anomalous indorser had no former rights on the instrument. Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671.

This result is unfortunate and to be avoided if possible, as was done in Lill v. Gleason, 92 Kan. 754, 142 Pac. 287, by construing section 121 as applicable only to parties secondarily liable who are connected with the title to the instrument, thus leaving the case of the anomalous or accommodation indorser to be dealt with as at common law whereby he was entitled to recover. See note approving the Kansas case in 28 Harvard Law Rev. 102.

In Miller v. Del Rio Mining Co., 25 Idaho, 83, 136 Pac. 448, where X and others, as accommodation payees for the benefit of

[1]The English Act interpolates "in due course." B. E. A. s. 59 (3).

the maker of a note, indorsed it to a bank and after its maturity X took up the note and afterwards transferred it to the plaintiff, it was held, without referring to section 121, that the other indorsers were discharged, but that a judgment against the maker should be affirmed.

Plaintiff, who was not a party to the note, wrote a guaranty on the back and later paid the note but did not take an assignment of it. In an action against the makers, it was held that as plaintiff had no former rights on the instrument, the action was not on the note but for reimbursement, and hence he was not entitled to recover attorney's fees and interest stipulated in the note. Noble v. Beeman-Spaulding Co., 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162, S. C. secs. 29, 63, 68, 192.

In Pease v. Syler, 78 Wash. 24, 138 Pac. 310, a maker who signed for the accommodation of a co-maker and who was compelled to pay the note, was treated as between himself and his co-maker as a party secondarily liable, and it was held in an action on the note that he was subrogated to the rights of the creditor and entitled to recover from his co-maker, not only the amount paid on the note, but the attorney's fees stipulated in the note, which the payee would have been entitled to recover.

An indorser for the accommodation of the payee, who is obliged to pay the amount of the note to the holder bank, and receives the note, becomes the purchaser of the note, and can recover of the maker. The N. I. L. was not cited. Graves v. Neeves, 183 Ill. App. 235.

The holder of a note may recover the full amount against the maker notwithstanding payment by a guarantor, the recovery inuring to the benefit of the guarantor to the extent of the payment by him. Assets Realization Co. v. Mercantile Nat. Bank, 167 App. Div. 757, 153 N. Y. Supp. 156.

The possession of a note by the last of several accommodation indorsers justifies the conclusion that he has paid it to the holder and entitled him to recovery against prior indorsers. The N. I. L. was not cited. Hill v. Buchanan, 71 N. J. Law 301, 60 Atl. 952.

Possession of a note by the payee is *prima facie* evidence of ownership, even though the note shows an uncancelled indorsement by the payee. The N. I. L. was not cited. Waldock v. Winkler (Okla.), 152 Pac. 99.

(*b*) It is submitted that, although subsection 1 of section 121 is a codification of the case of Beck v. Robley, 1 H. Blackstone 89 note (a), and of other cases which followed that case, the opportunity might well have been taken to correct the error of these cases. There is no reason why a drawer, who pays a bill payable to the order of a third person, and which bears the indorsement of the payee or last indorsee, should not be permitted to recover on it against the acceptor and to transfer his right to others. The drawer in such case acquires the title to the bill which is not legally extinguished because it has not been paid by the party primarily

liable, nor equitably unless the drawer was an accommodation party, which case is taken care of by subsection 2. The only reason given by Lord Mansfield for his judgment in Beck v. Robley was that if the drawer could negotiate the bill, this would make the indorser liable. This was, however, an error. The drawer himself could, of course, not sue the indorser, a party subsequent to himself, and since payment by a prior party discharges subsequent parties, the transferee of the drawer after maturity would be subject to the equity of the indorser.

(*c*) Where the payee of a check obtained it by false pretenses and the consideration never passed to the drawer, and the payee indorsed it to the plaintiff, a holder in due course, it was held, that the transaction was for the accommodation of the payee, that he was the party actually primarily liable to the indorsee, so that a payment by him to the indorsee, who retained the check and sued the drawer, discharged the check as against all parties. Josephsohn v. Gens, 85 Misc. Rep. 372, 142 N. Y. Supp. 451.

The result was right, but it is submitted that the reasoning is wrong. The instrument was not made for the accommodation of the payee, but as the indorsee after payment to him held the title in trust for the payee, to whose benefit recovery by the indorsee from the maker would inure, and as the payee would be liable over to the drawer, in order to prevent circuity of action, recovery by the indorsee should not be permitted.

Sec. 122. Renunciation By Holder.

The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Broad & Market Nat. Bank v. N. Y. & E. Realty Co., 102 Misc. Rep. 82, 168 N. Y. Supp. 149, S. C. sec. 119-3.

An agreement for immediate payment of part of a promissory note is sufficient consideration for the release of a surety from

obligation to pay the residue. But under section 122, N. I. L., such release must be in writing, "renunciation" being there used in the sense of "release." Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724; Pitt v. Little, 58 Wash. 355, 108 Pac. 941; Whitcomb v. National Exchange Bank, 123 Md. 612, 91 Atl. 689, S. C. sec. 119-3.

The term "renunciation" describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishing of a demand upon an agreement supported by a consideration. Therefore this term includes the release of a claim by virtue of an accord and satisfaction, as well as a gratuitous waiver of liability. Whitcomb v. National Exchange Bank, 123 Md. 612, 91 Atl. 689, S. C. sec. 119-3.

W made his note to plaintiff in payment for stock. W afterwards sold the stock to defendant, who gave his note to W for part of the price and for the residue defendant indorsed W's note to plaintiff. In an action on W's note, *held*, that defendant's indorsement was not without consideration and was not an oral promise to pay the debt of another, and also that section 122, N. I. L., did not prevent plaintiff from claiming a novation against defendant by the release of W, as the plaintiff could waive the provision that a renunciation must be in writing, since it was for his benefit. Gimmet v. Greene, 87 Wash. 40, 151 Pac. 99.

The release of one joint maker with reservation of holder's rights against all other parties is not an absolute and unconditional renunciation of all the holder's rights, but only a renunciation of his rights against the one released. Davis v. Gutheil, 87 Wash. 596, 152 Pac. 14, S. C. sec. 120.

A holder may covenant not to sue the maker and reserve his rights against an indorser even though the note is made by a firm and indorsed by members of the firm individually. Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. Rep. 416.

Defendant, one of the makers of a note, tendered payment to the holder upon the bankruptcy of the principal debtor, but the tender was declined. *Held*, that the refusal of the tender was not a renunciation of the holder's rights against defendant, and that the defendant was liable on the note for the balance not collected from the bankrupt's estate. Jamesson v. Citizens' Nat. Bank, 130 Md. 75, 99 Atl. 994, S. C. sec. 29.

This section applies only to the renunciation of valid enforceable obligations, and does not render incompetent, evidence of an oral agreement by the holder to return to the maker a note which, as was known to the holder when he took it, was without consideration. Hornburg v. Larson, 93 Wash. 74, 160 Pac. 11.

After the death of the payee, a promissory note was found enclosed in an envelope with a writing addressed to his executors stating that he wished the note cancelled in case of his death, and if the law did not allow this to notify his heirs that it was his wish and orders. *Held*, not a valid renunciation. Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891.

The payee of a note wrote and signed an indorsement thereon that the note was to be void and to become the property of the maker at the death of the payee, and delivered the note to a third person to deliver to the maker after the payee's death, and in the meantime to collect and pay the interest to the payee. *Held,* that this was a present gift of the principal of the note to the maker with a reservation of the interest during the life of the payee. The N. I. L. was not cited. Pyle v. East, 173 Iowa, 165, 155 N. W. 283.

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The holder of a demand note, being *in articulo mortis,* instructed his nurse to write a memorandum to the effect that the note should be destroyed as soon as it could be found. *Held,* that this was not a renunciation within the statute, but merely an expression of an intention or desire to renounce. *In re* George, 44 Ch. D. 627.

C, the holder of a note made by B, delivered the note to X, a devisee under the will of B, and verbally renounced his rights. The real estate in X's hands was charged with payment of the testator's debts. *Held,* that the note was not discharged, for although the word "maker" would probably be held to include the executor of the maker, it did not include his devisees. Edwards v. Walters [1896], 2 Ch. 157.

Sec. 123. Cancellation—Unintentional—Burden of Proof.

A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative; (*a*) but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.(*b*)

This section contains no matter not embraced in the title of the Act, and hence does not contravene a provision of the Constitution that no law shall embrace more than one subject, that subject to be expressed in the title. Gilley v. Harrell, 118 Tenn. 115, 101 S. W. 424, S. C. sec. 1-4.

(*a*) The president made, and the directors and stockholders of a bank indorsed, a note payable to the bank. Subsequently, certain of the indorsers erased their names and each gave a new note to the bank for a proportionate share of the amount. This was done without the authority or knowledge of the board of directors. *Held,* that the cancellation of the indorsements was inoperative, and also that the validity of the indorsement of another indorser who did

not take part in the unauthorized cancellation of the other indorsements was not thereby affected. Union Bank of Brooklyn v. Sullivan, 214 N. Y. 332, 108 N. E. 558, S. C. secs. 25, 66, 70, 80.

The burden is on the plaintiff to overcome the presumption arising from an apparent cancellation of notes sued on. *In re* Philpott's Estate (Iowa), 164 N. W. 167; Morris v. Reyman, 55 Ind. App. 112, 103 N. E. 423; First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4; McCormick v. Shea, 50 Misc. Rep. 592, 99 N. Y. Supp. 467, S. C. sec. 120-2. No consideration is necessary for the cancellation. *Ib.*

Where it appeared that the date and the signature of the maker of a note were destroyed by burning, the presumption was that the burning was intentional and done for the purpose of cancelling the instrument, and the burden was on the holder to prove the contrary. Jones' Adm'rs. v. Coleman (Va.), 92 S. E. 910.

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An agent for collection, without authority, accepted from the acceptor less than the amount claimed by the holder, and allowed the acceptor to cancel his signature. The holder refused to ratify the agent's act, returned the money to the acceptor, and received back the bill. *Held*, that the cancellation was inoperative. Dominion Bank v. Anderson, 15 Sess. Cas. [1888] 408. See also Dominion Bank v. Bank of Scotland, 16 Sess. Cas. [1889], 1081 and S. C. affirmed [1891] A. C. 592.

Sec. 124. Alteration of Instrument—Effect of.

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.(*a*)

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.[1](*b*)

The Illinois Act interpolates "fraudulently or" (probably "and" was intended) before "materially" in line one and interpolates "by the holder" after "altered" in the same line. In South Dakota the words "by the holder" are interpolated after "altered" in the first paragraph.

[1] "Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor." B. E. A. s. 64 (1).

The Wisconsin Act interpolates "orally or in writing" after "assented," in the fourth line.

The right, recognized by some courts, of a holder, who has innocently altered an instrument to restore it to its original condition and to recover thereon,[2] seems to be taken away by this section. But see Donneybrook State Bank v. Corbett (N. D.), 163 N. W. 275, *infra,* p. 344, not citing the N. I. L.

(*a*) Bryan v. Harr, 21 App. D. C. 190; Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131, S. C. sec. 14; Birmingham Trust Co. v. Whitney, 95 App. Div. 280, 88 N. Y. Supp. 578; S. C. sec. 125.

The general rule of pleading alteration under the code requires that, where the instrument is declared on in the altered form, the answer should be in the form of a general denial of all the material allegations of the complaint, or a specific denial of the execution of the instruments sued on, or a specific statement of the facts relied upon for a defense. Farmers' & Stockgrowers' Bank v. Pahvant Valley Land Co. (Utah), 165 Pac. 462, S. C. sec. 16.

Defendant maker pleading the material alteration of the note has the burden of proof. Kapp v. Levyson (Okl.), 160 Pac. 457.

In an action on a promissory note which is regular on its face, the burden of establishing a defense that the instrument had been fraudulently altered the holder after its execution and delivery is upon the defendant. The N. I. L. was not cited. Teske v. Baumgart, 99 Neb. 479, 156 N. W. 1044.

Where the defendant admitted his signature to a note but pleaded alteration of the note after delivery and the note was regular on its face, it was properly admitted in evidence, and the burden of proof that it was altered without his consent and after delivery was held to be on the defendant. The N. I. L. was not cited. Cavitt v. Robertson, 42 Okla. 619, 142 Pac. 299.

The proper practice when a note is offered which appears to have been altered is for the court to determine, upon inspection and in view of the state of the evidence, whether the instrument should be admitted without further proof to explain the alterations, and to the exercise of the court's sound discretion no exception lies. The N. I. L. was not cited. Wood v. Skelley, 196 Mass. 114, 81 N. E. 872.

Where the alteration is material and suspicious, it is incumbent upon the party offering it to give some evidence to explain its condition. Whether the alteration is suspicious is a question of law for the court, but when the instrument has been admitted, the question whether the alteration was made before or after deliv-

[2] 1 Ames Cases Bills and Notes 449; James v. Tilton, 183 Mass. 275, 67 N. E. 326. (Note made before N. I. L. adopted.)

ery or with the consent of the parties is for the jury. Ofenstein v. Bryan, 20 App. D. C. 1; Towles v. Tanner, 21 App. D. C. 530, *semble*. The N. I. L. was not cited in these cases.

In an action on a note the burden of explaining an alteration apparent on its face is on the plaintiff, and the note should not be received in evidence until an adequate explanation has been given. The N. I. L. was not cited. Eisner v. Crommette, 151 N. Y. Supp. 3.

When a negotiable instrument has blemishes upon it the burden of proof that the blemish was on it when it was executed, is on the holder, and the jury should consider all the evidence bearing on the question. A charge that the jury are at liberty to inspect the note and determine from said inspection alone in the absence of other satisfactory evidence is erroneous. Peterson v. Emery, 154 Ill. App. 294.

If there is nothing on the face of a note to indicate a material alteration and no evidence tending to show such alteration, it is error to submit the question of alteration to the jury. Brown v. Marmaduke, 248 Pa. 252, 93 Atl. 1021, 1023.

Where the alteration is apparent, the burden of explaining it is on the party claiming under the instrument, but where the alteration is not apparent on the face by the use of ordinary care in inspecting the instrument, the burden is on the party alleging it. Arnold v. Wood, 127 Ark. 234, 191 S. W. 960.

If the paper shows on its face that it has been materially altered, or if this is shown by evidence, the burden is on the holder to explain the alteration. Harrison v. Pearcy, 174 Ky. 485, 192 S. W. 513, S. C. sec. 51.

The holder of a note, having admitted at the trial that he altered the note after delivery, it was not error to charge that the burden was on him to show that he did this with the consent of the maker. West v. Naten (Okla.), 152 Pac. 342.

In an action on a note where the defendant interposed a special plea of *non est factum* on the ground of alteration, the burden of proof is on the defendant, but if the alteration is apparent on the face of the paper and is suspicious, the burden is on the plaintiff to account for its condition in a manner consistent with good faith on his part. Peevey v. Buchanan, 131 Tenn. 24, 173 S. W. 447.

Where it was alleged that the words, "Notice and protest waived and for value received payment of the within note guaranteed by," were stamped over the signatures of indorsers, after the signing, and the stamping appeared to be regular on its face, without erasures, interlineations or improper action indicating that it was not duly authorized, the presumption, by the great weight of authority, is that the stamping was properly made before delivery of the note to plaintiff. Farmers' & Stockgrowers' Bank v. Pahvant Valley Land Co. (Utah), 165 Pac. 462, S. C. sec. 16.

Where defendants made payments of interest after maturity of the note so stamped, it was material to allege in the answer that the alteration was made, not only without their consent or

knowledge, but with the privity or knowledge on the part of the plaintiff before delivery and that defendants had not since ratified the alteration. *Ib.*

A promissory note was originally dated April 14, 1909. A line was drawn through April and May written above. *Held,* that there was nothing suspicious in the appearance of this note and the presumption is that the alteration was made before the execution of the instrument. Ensign v. Fogg, 177 Mich. 317, 143 N. W. 82, S. C. sec. 125.

If the maker of a note showing on its face an alteration as to amount prejudicial to the payee and holder and advantageous to the maker, makes no objection to it on the trial, on the ground of such alteration, admits his signature after inspection and defends on a different ground, a jury would be warranted in finding that the alteration was made, authorized, or assented to by him, wherefore the court on demurrer to the evidence should find the note to be valid. Harper v. Clear Fork Co. (W. Va.), 92 S. E. 565.

Circumstances tending to show that there was no such note bearing the date of the one sued on, are admissible to prove its alteration. Hamilton Nat. Bank v. Emigh (Ark.), 192 S. W. 913.

See Williston Contracts,[1] sections 1915-1917, for discussion of the correct rules of pleading and burden of proof in actions on altered instruments.

The defendant at the request of X signed a note payable to plaintiff with a blank for the amount and gave it to X for X to sign as co-maker and to fill up and use in the purchase of a stock of goods by X. X filled up the note for a certain sum and handed the note to plaintiff, who gave it back saying he must have interest and X inserted the words, "with interest at six per cent.," and transferred it to plaintiff, the vendor of the goods. There was no blank for interest in the note. There was a dispute as to the authority of X to fill in the particular sum, but the court found that such authority was given. The court, however, found that X was not authorized to make the note payable with interest and held that the insertion of the interest clause was a material alteration which avoided the instrument. The N. I. L. was not cited. White v. Shephard, 140 Ky. 349, 131 S. W. 17.

This section applies to the physical alteration of the instrument. An extension of time, given by the holder of a note to the principal maker, without the consent of a surety co-maker, is not an alteration. Richards v. Market Exch. Bank Co., 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99, S. C. sec. 119.

The parties to an instrument may agree to a material alteration thereof without a new consideration. When sureties on an instrument indorse thereon their agreement to accept the material alterations (a change in the time of payment), they ratify the material change made, and are still liable. Holyfield v. Harrington, 84 Kan. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131.

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[1] Not yet published, but to appear presently.

Notes given to close an account were fraudulently altered by the payee. *Held,* that if the notes were innocently altered and were not taken in absolute payment, recovery could have been had on the original debt, yet as they were fraudulently altered, there could be no recovery either on the notes or on the original debt. The N. I. L. was not cited. Columbia Grocery Co. v. Marshall, 131 Tenn. 270, 174 S. W. 1108; Bank of Flat River v. Walton, 187 Mo. App. 621, 173 S. W. 56, accord as to the case of an innocent alteration or a spoliation by a stranger.

An innocent alteration of a note will not avoid a mortgage given to secure it. Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 421, S. C. sec. 125; Edington v. McLeod, 87 Kan. 426, 124 Pac. 163, 41 L. R. A. (N. S.) 230.

A fraudulent alteration not only invalidates the note but extinguished the obligation for which it was given. Sherman v. Connecticut Mut. Life Ins. Co., 222 Mass. 159, 110 N. E. 159.

A written agreement, securely glued to an accepted bill of exchange, is a part thereof, and if it be detached therefrom, without the acceptor's consent, this is a fraudulent material alteration. But a holder in due course may recover on the instrument according to its original terms. Bothell v. Schweitzer, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263.

Sed quaere, since the instrument, as originally executed was not a negotiable instrument and therefore not subject to the N. I. L.?

Where negotiable promissory notes were attached to a contract by perforations for the purpose of being detached, it is not a material alteration to detach such notes. Conqueror Trust Co. v. Simmon (Okla.), 162 Pac. 1098.

Defendant executed a note attached to a contract which authorized the payee to detach the note. *Held,* the detachment by the payee did not avoid the instrument and that a purchaser of the note for value, without notice of the conditions in the contract, could recover on the note. Robertson v. Commercial Security Co., 152 Ky. 336, 153 S. W. 450.

And knowledge by such purchaser that the payee had detached the note from a contract and that the contract authorized the payee to do this, will not affect the purchaser with knowledge of a fraud practiced by the payee when the note was given. Pratt v. Rounds, 160 Ky. 358, 169 S. W. 848, S. C. secs. 56, 184.

The interlineation of the words, "Service of notice and protest is hereby waived," is a material alteration and avoids the instrument as against a prior indorser who did not assent thereto. Stanford v. Stanford (N. J.), 101 Atl. 388.

Certificates of deposit were made by a bank to a church corporation payable to the order of the corporation on return of the certificates indorsed by the president and treasurer. The treasurer fraudulently altered the certificates by erasing the word "and" and inserting the word "or," so that they were payable to the order of the president or treasurer, indorsed them and

obtained payment from the bank. *Held,* that this was not a good payment and that the bank was liable to the corporation. The N. I. L. was not cited. Trustees of German, etc., Congregation v. Merchants' Nat. Bank (Minn.), 165 N. W. 491.

In an action by an indorsee, the maker of a note answered that the note was an accommodation note, and that plaintiff took it with knowledge. At the trial, it appeared that plaintiff had altered the note by adding "with six per cent. interest." A motion to dismiss on this ground, among others, was denied, and judgment given for plaintiff which was reversed. Witteman v. Glass, 117 N. Y. Supp. 940. The discussion by the court of the question whether the note was an accommodation note to the knowledge of plaintiff seems irrelevant; see section 29 N. I. L.

An accommodation indorser of a note, completed but so drawn as to leave spaces, which can be filled in so as to increase the amount, and which were so filled in by the maker, without the indorser's consent, is not liable, even to a holder in due course, for such increased amount, but only for the original amount. National Exchange Bank v. Lester, 194 N. Y. 461, 87 N. E. 79. But the drawer of a check, negligently drawn by leaving spaces which can be and are filled in to an increased amount, without exciting suspicion, and which is paid in good faith by the drawee bank, can not recover the amount from the bank. The question of negligence is for the jury. Section 124 does not cover the case and under section 196 the rule of the law merchant must prevail. Young v. Grote, 4 Bing, 253, approved; Timbel v. Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. Supp. 497.

In Trust Co. of America v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367, the case of Timbell v. Garfield Nat. Bank was approved, and the case of National Exchange Bank v. Lester, *supra,* distinguished on the ground that the depositor owes a duty to the bank to exercise care in drawing his checks, and it was even held in this case that the depositor must lose, where he signed a check in blank, which was stolen, filled up, and paid by the bank in due course. Clifford Banking Co. v. Donovan Co., 195 Mo. 262, 94 S. W. 527, *semble,* accord.

In S. S. Allen Grocery Co. v. Bank of Buchanan Co., 192 Mo. App. 476, 182 S. W. 777, it was held that the duty of the depositor to the bank is such that he must bear the risk of signing and keeping a blank check which was stolen and filled up, whether the keeping be careful or negligent. Also, that where the payment of the check overdrew the account of the depositor, the bank is to be regarded as an innocent holder for value, and that the loss must fall on the depositor if he was negligent in the keeping of the blank signed check, section 15 not being inconsistent with an estoppel by negligence. Also, that the bank is not bound to draw a suspicious inference from the fact that the body of the check was in an unfamiliar handwriting or that it overdrew the account.

But in Limick v. Nutting & Co., 140 App. Div. 262, 125 N. Y. Supp. 93, it was held that while the drawer owed a duty to the

bank to guard against the escape of a check signed in blank, he owed no such duty to a purchaser of the check.

And in Holzman, Cohen & Co. v. Teague, 156 N. Y. Supp. 290, it was held that the purchaser of a promissory note, signed in blank, stolen and negotiated, could not recover against the maker; that it was not negligence to leave such a note on the maker's desk. Section 15 was cited.

In Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 70 Atl. 876, S. C. *supra,* sec. 9, the court seemed to approve the rule of Young v. Grote, but made no reference to the Negotiable Instruments Law on this point.

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A bill for £500 was accepted. The drawer afterwards changed the amount to £3,500 by filling spaces left by himself when he drew the bill. A holder in due course can recover only £500 from the acceptor. Scholfield v. Londesborough [1896], A .C. 514.

The mere leaving of spaces in a check which can be filled in is not by itself a violation of duty by a customer to his banker, even though the jury find that the check was drawn negligently and that the bank was not guilty of negligence in paying the check. Scholfield v. Londesborough followed. Colonial Bank of Australasia v. Marshall [1906], A. C. 559, Privy Council.

But in London Joint Stock Bank v. Macmillan [1918], A. C. 777, a member of the plaintiff firm signed a check payable to the firm or bearer at the request of a clerk who said he wanted the money for petty cash. The check was blank as to amount except that there were figures "2.0.0." in the space intended for figures. The clerk wrote the words "one hundred and twenty pounds" in the space left for words and the figures "1" and "0" on either side of the figure "2," drew the money from the defendant bank and absconded. Plaintiffs sued the bank for the amount charged against their account.

The House of Lords held, reversing the Court of Appeal,[1] that defendant was not liable on the ground that the customer owed a duty to the bank to exercise reasonable care in drawing checks to prevent the banker from being misled. That the loss to the bank was a natural and direct cause of the failure to exercise such care. That Young v. Grote was correctly decided and that it was not inconsistent with Scholfield v. Earl of Londesborough. See a note on this case in the House of Lords in 145 Law Times, 208. See also the contrary decision of the court below criticised in a learned note on the doctrine of Young v. Grote by Professor Chafee in 31 Harvard Law Rev. 779.

(*b*) *Quaere*, whether a material alteration by a stranger will avoid a negotiable instrument? Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49, S. C. sec. 125. The language of section 124 leaves little room for doubt on this question.

[1] [1917] 2 K. B. 439.

Professor Ames, Judge Brewster and Mr. McKeehan all agree that section 124 abrogates the American doctrine of spoliation and substitutes the English rule.

Professor Ames regrets the return to archaic formalism, *infra,* pp. 469, 548, 549, but Judge Brewster approves the change. See *infra,* p. 470.

Although under the first paragraph of the section a spoliation will avoid the instrument, yet the second paragraph leads to the same result as under the former law, if the instrument is in the hands of a holder in due course, that is, he may recover according to the original tenor. This is true not only of a subsequent holder in due course but of the holder at the time of the spoliation, if he is a holder in due course. In Fry v. Jenkins, 173 Ill. App. 486, a change of date by one not a party, without the consent of the holder, was held not to prevent recovery if the original tenor can be clearly shown. But if the holder at the time of the spoliation is a donee of the instrument, it would seem that he could not recover.

Bledsoe v. City Nat. Bank, 7 Ala. App. 195, 60 So. 942; Johnston v. Hoover, 139 Iowa, 143, 117 N. W. 277, S. C. sec. 14; Broadway Nat. Bank v. Heffernan, 220 Mass. 247, 107 N. E. 921, S. C. sec. 125; Mutual Loan Assoc. v. Lesser, 76 App. Div. 614, 78 N. Y. Supp. 629; First Nat. Bank v. Gridley, 112 App Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4, 123; Smith v. State Bank, 54 Misc. Rep. 550, 104 N. Y. Supp. 750, S. C. sec. 29; Usefof v. Herzenstein, 65 Misc. Rep. 45, 119 N. Y. Supp. 290, S. C. sec. 7; Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14, S. C. secs. 52, 52-1.

When a materially altered note was transferred before the passage of the Negotiable Instruments Law, the indorsee can not recover against the maker on it, according to its original tenor. Hecht v. Shenners, 126 Wis. 27, 105 N. W. 359.

Defendant made to the plaintiff bank a mortgage to secure the sum of $1,500 for the benefit of one Gray to whom defendant was indebted. The promissory note was made at the same time by defendant, which should have been for $1,500, but by some inadvertence the word "hundred" was omitted after the words "fifteen" athough the figures "$1,500" were plainly written at the top of the note. After the making of the note plaintiff's clerk discovered the mistake and innocently wrote the word "hundred" diagonally across the face of the note. It was held that the defendant was liable to the plaintiff for the sum of $1,500 and foreclosure of the mortgage was granted. The N. I. L. was not cited. Donneybrook State Bank v. Corbett (N. D.), 163 N. W. 275.

Where the mere inspection of a check showed that it had been altered (in date), a purchaser can not recover on it according to its original tenor. He can not be a holder in due course because

it was not regular on its face (section 52). Elias v. Whitney, 50 Misc. Rep. 326, 98 N. Y. Supp. 667. This case reaches the same result as section 64(1) of the Bills of Exchange Act, where the words "but the alteration is not apparent" are interpolated, *supra*, p. 337, n. 1. Farmers' State Bank v. West, 77 Ore. 602, 152 Pac. 238; Pensacola State Bank v. Melton, 210 Fed. Rep. 57, S. C. sec. 52, accord.

A check for $37.98 had on it a printed clause, "Not good for more than $15." A line was drawn through these words but they were plainly discernible. *Held*, that a purchaser of the check was put upon inquiry as to its validity, but was allowed to recover the amount for which the check was authorized to be made. The N. I. L. was not cited. Marshall & Co. v. Kirschbraun & Louis, 100 Neb. 875. In this case the alteration was made by an agent of defendant, who was authorized to make the draft for an amount not in excess of $15.00, and the defendant had received the consideration. The case may therefore be distinguished from the preceding cases.

The maker of a note indorsed in blank by the payee stole it from the payee, altered it, and negotiated it to the plaintiff, a holder in due course. *Held*, that the plaintiff could recover against the payee-indorser according to the original tenor of the note. *Quaere*, whether, after the fact of alteration had appeared, plaintiff must amend by inserting counts upon the note as originally made? Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, 16, 56, 191.

The innocent payee of a note altered by the maker after an irregular indorser had signed, and before delivery to the payee, is a holder in due course and can recover against the indorser according to the original tenor of the note. Thorpe v. White, 188 Mass. 333, 74 N. E. 592, S. C. secs. 52, 64-1; *cf.*, First Nat. Bank v. Gridley, *supra*, sec. 66.

Alteration in amount by the maker after an accommodation indorsement but before negotiation. The accommodation indorser is liable for the original amount. Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, *semble*, affirmed without opinion, 180 N. Y. 549, S. C. sec. 66.

A note was indorsed in blank, but with a place of payment specified thereon, and given to another person with authority to fill up. *Held*, that authority to fill blanks did not authorize an erasure of the place of payment, and the interlineation of another place, that such alteration was material, and that an indorsee, having notice of the alteration could not be a holder in due course and could not recover according to the original tenor, even though he paid value for the note. First Nat. Bank v. Barnum, 160 Fed. 245.

The payee of a check represented that it was lost and received another check from the drawer, and collected it, and then changed the first check by dating it ten days later, and transferred it to plaintiff, a holder in due course. *Held*, that the drawer's loss

was not caused by delay in presentment, but by reliance on the payee's false representations, and that plaintiff could recover from the drawer of the check according to its original tenor. Moskowitz v. Deutsch, 46 Misc. Rep. 603, 92 N. Y. Supp. 721.

A joined with B in making a promissory note for the accommodation of B. The note was payable to the order of "ourselves" and was indorsed with the individual names of A and B. Thereafter B, without the knowledge or consent of A, altered the note by stamping above the names of the makers the words, "A-B Mercantile Co., per," and adding after his own name the abbreviation "Pres." and after the name of A the abbreviation "Sec." B also stamped "A-B Mercantile Co." above the names of A and B, as indorsers, and wrote "Pres." after his own name, indorsed it again individually, and had his son also indorse it. Then B negotiated the note to plaintiff, a holder in due course. A was sued as an indorser. *Held*, that he was liable according to the original tenor under section 124, and that section 23 had no application. Public Bank v. Knox-Burchard Co. (Minn.), 160 N. W. 667.

Defendant signed a note for $15,000 for the accommodation of G, with a blank for the name of the payee, because it was not known from whom the money could be obtained, and upon condition that the note should also be signed by R and others. A bank to which application was made would lend only $11,000 and on condition that R guarantee the payment. The bank filled in R's name as payee and had him indorse the note and took his personal guaranty of its payment. The bank indorsed a payment of $4,000 on the back of the note and gave R $11,000, less the agreed discount, and R gave the money to G. *Held*, a material alteration as to the amount and as to the effect of the instrument and the bank being a party to the alteration could recover nothing from the defendant. Washington Finance Corp. v. Glass, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043.

It is submitted that this case was decided on wrong grounds. The result might have been reached on the ground that the bank was not a holder in due course, because it knew that the instrument was not complete when it was offered to it for discount and the failure to secure the other signatures would therefore operate as a defense. But the court passed over this ground of defense and based its conclusion solely on the defense of alteration. The decision is against the weight of authority at common law[1] and there is nothing in sections 124 and 125 to effect a change in this respect. The formal character of the instrument was unchanged and the defense of alteration arises only when the form is altered, not when a collateral matter is added, whatever may be the substantial effect thereof.

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[1] Merchants' & Mechanics' Bank v. Evans, 9 W. Va. 373; State Solicitors Co. v. Savage, 39 Fla. 703, 23 So. 413; Bland v. Fidelity Trust Co., 71 Fla 499, 71 So. 630, and cases cited therein.

It has been suggested, moreover, that the change in the law made by the second paragraph of 124, whereby a holder in due course of an altered instrument may recover according to the original tenor, necessarily limits the operation of the first clause to alterations which are prejudicial to the non-assenting party. Otherwise if the plaintiff had bought the instrument *bona fide* for $11,000 after the indorsement of payment of $4,000, the note would be avoided by the first paragraph and yet the plaintiff under the second paragraph could recover $15,000.[1]

In Bland v. Fidelity Trust Co., 71 Fla. 499, 71 So. 630, it was held that the indorsement of payment on the back of a note, although dated the same day as the note, did not change the "sum payable" or "alter the effect of the instrument in any respect" and was not a material alteration. Such memorandum is no part of the contract of the parties but is merely a receipt and evidence against the holder of the fact of payment. The original note remains the same.

The plaintiff delivered two notes for $500, blank as to payee, and a policy of insurance upon his life with an assignment thereof, blank as to assignee, to W to secure a loan of $1,000. W raised one note to $1,500 and delivered it with the other note and the policy and assignment to S as security for a loan of $2,000, which W afterwards paid and received back the notes and policy. Later the policy and a forged assignment thereof were again transferred by W to S with a note for $3,000 bearing the forged signature of the plaintiff as maker. W having died, the genuine $500 note and the raised $1,500 note were found among his papers. Plaintiff sued S and the administrators of W. *Held*, that the defendant S must deliver the policy, the forged assignment and forged $3,000 note to plaintiff and that the administrators of W upon payment by plaintiff of the genuine $500 note must deliver to him that note and the raised note for $1,500. Sherman v. Connecticut Mut. Life Ins. Co., 222 Mass. 159, 110 N. E. 159.

The last clause of this section does not apply to a note which was materially altered after maturity, though it was thereafter indorsed and delivered to plaintiff who took *bona fide*. Pensacola State Bank v. Melton, 210 Fed. Rep. 57, S. C. sec. 52.

D made a note payable to the order of M for his accommodation. M discounted this note with a bank and it was subsequently renewed. At the time of renewal M took the old note, altered its date and delivered it to the plaintiff bank in exchange for a note to which D's name was forged as maker. *Held*, that the plaintiff bank can not recover on the altered note from the maker. (1) The second paragraph of section 124 applies only to instruments altered before their extinguishment by payment. (2) Giving up the forged note was not value. Fairfield Co. Nat. Bank v. Hammer, 89 Conn. 592, 95 Atl. 31.

A note, made payable to X, was delivered by the maker to Y, who erased the name of the payee and substituted his own name and

[1] See 77 Central Law J. 342.

indorsed the note to plaintiff, who paid value without notice and in good faith. *Held,* that the alteration avoided the note and that plaintiff can not recover "according to the original tenor" because such a restriction would make the note payable to X and he had never indorsed it. Andrews v. Sibley, 220 Mass. 10, 107 N. E. 395; First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445, S. C. secs. 66, 109, 119-4, 123.

In Munroe v. Stanley, 220 Mass. 438, 107 N. E. 1012, S. C. sec. 14, as the maker was willing to pay the note according to the original tenor, the court declined to decide whether the purchaser of a note altered as to amount and negotiated to the purchaser, who filled in the blank for the name of the payee with his own name, could recover according to the original tenor.

But in Tower v. Stanley, 220 Mass. 429, 107 N. E. 1010, S. C. secs. 8, 14, where a note, blank as to the name of the payee, was delivered to one with authority to fill in his own name, but he fraudulently altered the instrument and negotiated it with the blank unfilled, and the purchaser filled the blank with his own name, the purchaser was held not a holder in due course and was not entitled to recover according to the original tenor of the note.

So, also, in Stone v. Sargent, 220 Mass. 445, 107 N. E. 1014, S. C. sec. 14, in which case the note was altered by the payee erasing his name, leaving the space blank, and increasing the amount, it was held that the note was not enforceable against the maker even according to its original tenor, since the transferee having taken the note in an incomplete state was not a holder in due course.

A note without consideration, dated and payable in Ohio, was materially altered by the maker in New York at the request of the payee after it had been indorsed by defendant in New York, and was thereafter transferred in Ohio to a holder in due course. *Held,* that the effect of the alteration must be determined by the law of New York (where the N. I. L. was in force), not by that of Ohio (where the N. I. L. had not yet been adopted), and that the holder in due course could recover against the defendant according to the original tenor of the note. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810, S. C. sec. 125.

ENGLAND—

This proviso[1] is not retrospective, and even if it were so, the "necessary modification" referred to in section 89[2] would exclude Bank of England notes from the operation of section 64.[3] Moreover the alteration is apparent if the bank could at once decipher and point out to the holder that the note had been materially altered, though the alteration might not be obvious to everybody. Leeds & County Bank v. Walker, 11 Q. B. D. 84.

A check for $5.00 was certified by the drawee bank. The

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[1] See second paragraph of section 124 N. I. L.

[2] See *infra,* p. 562.

[3] See section 124 N. I. L.

drawer afterwards altered the check to $500. The check was paid by the bank to a holder in due course. The bank can recover $495.00 from the holder. Imperial Bank v. Bank of Hamilton [1903], A. C. 49.

Cases under sections 14, 23 and 125 should also be consulted in connection with this section.

Sec. 125. What Constitutes a Material Alteration.

Any alteration which changes:—

1. The date;(*a*)
2. The sum payable, either for principal or interest;[1](*b*)
3. The time or place of payment;(*c*)
4. The number or the relations of the parties;[2](*d*)
5. The medium or currency in which payment is to be made;[2]

Or which adds a place of payment where no place of payment is specified,[3] or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.[4](*e*)

A bill in equity for relief on the ground that an alteration was made in a negotiable instrument should describe the alteration in order that the court may see whether it was a material alteration. Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49, *semble*, S. C. sec. 124.

A promissory note was delivered to the plaintiff with no revenue stamp on it, as required by the laws of the United States. Plaintiff subsequently affixed a stamp and cancelled it in the maker's name. *Held*, that as the note was admissible in evidence in Massachusetts courts without a stamp, annexing the stamp was not a material alteration. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636, S. C. sec. 28.

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1 The English Act omits the words "either for principal or interest." B. E. A. s. 64 (2).

2 Not in B. E. A. See s. 64 (2).

3 The English Act reads, "And where a bill has been accepted generally, the addition of a place of payment without the acceptor's consent." B. E. A. s. 64 (2).

4 The last clause is omitted in the English Act. B. E. A. s. 64 (2). But the section begins with the words "In particular the following alterations are material," indicating that the list is not intended to be exclusive of all other alterations.

(*a*) A note payable "one year after date" had the place and date line in print: "Seattle, Wash.— 189—," had inserted in ink "October 24th" and the figure "2" after "189," making the date "October 24th, 1892." The written part of the note recited that it was payable one year after date and due October 24, 1903. *Held,* that drawing line through 1892 in date line and making it read 1903 is not a material alteration. Lombardo v. Lomburdini, 57 Wash. 352, 106 Pac. 907, 32 L. R. A. (N. S.) 515.

(*b*) Ayers v. Walker, 54 Colo. 571, 131 Pac. 384, S. C. sec. 14; Edington v. McLeod, 87 Kan. 426, 124 Pac. 163, 41 L. R. A. (N. S.) 230, S. C. sec. 124.

A check was originally drawn as follows:

"Iron County Bank, Crystal Falls, Mich., Aug. 5, 1901.
Pay to G. L. or order $ 9 fifty cents
Dollars.
C. T. R."

Held, that the insertion of the figure 5 before the figure 9, the instrument being otherwise unchanged, is a material alteration, constituting a forgery. The N. I. L. was not cited on this point. Lawless v. State, 114 Wis. 189, 89 N. W. 891.

Adding the words "with interest" with or without a fixed rate is a material alteration. Broadway Nat. Bank v. Heffernan, 220 Mass. 247, 107 N. E. 921; Columbia Distilling Co. v. Rech, 151 App. Div. 128, 135 N. Y. Supp. 206; Dumbrow v. Gelb, 72 Misc. Rep. 400, 130 N. Y. Supp. 182; Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810, S. C. sec. 124.

But the insertion by the payee of the words "with interest," after execution, by authority of the maker, will not vitiate the note. The N. I. L. was not cited. Levy v. Arons, 81 Misc. 165, 142 N. Y. Supp. 312.

Where there was no agreement as to interest but the note had a provision for "interest at —— per cent.," it is not a material alteration to insert the legal rate, since the legal import is not thereby changed, and parol evidence is not admissible to contradict the stipulation for interest. The N. I. L. was not cited. Haas v. Commerce Trust Co., 194 Ala. 672, 69 So. 894; Crawford v. Simonton, 163 Ala. 609, 50 So. 1024, accord as to the first point.

(*c*) Mitchell v. Reed's Ex'r., 32 Ky. Law. Rep. 683, 106 S. W. 833; Pensacola State Bank v. Melton, 210 Fed. Rep. 57, S. C. secs. 52, 124.

An alteration in the maturity of a note is material whether the time of payment is thereby curtailed or extended. Palomcki v. Laurell (Ore.), 168 Pac. 935.

Whether an alteration is material is to be determined by the court, but when the alteration was made is a question for the jury. *Ib.*

A printed form of promissory note had on the margin the printed words, "Extended to ———." *Held,* not a material alteration discharging a surety-maker that the holder on or after maturity wrote in the blank space the words "May 1st, 1913," as a reference memorandum of a promise made by him to the principal maker at the time the words were written to extend the time of payment. Eaton v. Delay, 32 N. D. 328, 155 N. W. 644, L. R. A. 1916D, 528.

Where the makers of a note, other than the one for whose benefit it was made, gave it to the latter to negotiate, with a blank for the name of the payee and the date "July ———," they gave him implied authority not merely to fill in the name of a payee but also the date of the actual delivery to the payee, so long as it was done in a reasonable time, so that filling in such date, September 1st, at his discretion, was not an alteration. Holman v. Higgins, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916F, 1263.

The name of the bank, at which a note was payable, was changed after execution from People's Bank to First National Bank, without the consent of the makers. *Held,* not a material alteration where the People's Bank, a state bank, had to the knowledge of most, if not all, the makers, gone out of existence two years before, and had become the First National Bank. Even without the alteration the note would have been payable at the First National Bank. Melton v. Pensacola Bank, 190 Fed. Rep. 126, 111 C. C. A. 166, S. C. sec. 51.

(*d*) Defendant signed a note payable to her own order which was delivered unindorsed to plaintiff in renewal of another note on which defendant was an indorser. Plaintiff, without the consent of defendant, struck out the name of defendant as payee and inserted the name of the maker of the original note, who then indorsed the new note. *Held,* that the alteration was material and the note was avoided as to the defendant. Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134.

The defendants were accommodation payees of a note and indorsed the same. Thereafter the plaintiff at the request of the maker signed the note as maker to facilitate its transfer. The note was dishonored and the plaintiff took it up and sued the defendants. *Held,* that the addition of the name of the plaintiff as maker, without the consent of the defendants, was a material

alteration and discharged the defendants. Handsaker v. Pederson, 71 Wash. 218, 128 Pac. 230, S. C. sec. 68.

The addition at the maker's request of the name of a witness to the signature of sureties on a note after execution by the sureties and without their knowledge or consent, is a material alteration discharging the sureties. The N. I. L. was not cited. Swank v. Kaufman, 255 Pa. 316, 99 Atl. 1000, L. R. A. 1917D, 826.

The indorsement of a note by a stranger after its delivery to the payee at the time the note was negotiated to the plaintiff is not an alteration and does not discharge the maker. Ensign v. Fogg, 177 Mich. 317, 134 N. W. 82, S. C. sec. 124.

The addition of an indorser to a note without the consent of a prior indorser, but before the note was delivered to and accepted by the payee (who had no knowledge of the order of indorsing), is not such a material change as to release the non-consenting indorser. Devoy & Kuhn Coal Co. v. Huttig, 174 Iowa, 357, 156 N. W. 413, S. C. secs. 14, 192.

The addition of "Pt." to the name of the payee of a note is such a material alteration as will discharge the makers, especially one who wrote "surety" after his signature. Tyler v. First Nat. Bank, 150 Ky. 515, 150 S. W. 665.

But it is not a material alteration to add to an indorsee's name the abbreviation "Cash" when it had been agreed that the draft should be discounted by the trust company of which the indorsee was cashier. Birmingham Trust Co. v. Whitney, 95 App. Div. 280, 88 N. Y. Supp. 578.

(*e*) Stanford v. Stanford (N. J.), 101 Atl. 388, S. C. sec. 124; Conquerer Trust Co. v. Simmon (Okla.), 162 Pac. 1098, S. C. sec. 124; Pitt v. Little, 58 Wash. 355, 108 Pac. 941, S. C. sec. 122; Nottingham v. Ackiss, 107 Va. 63, 57 S. E. 592, 67 S. E. 351.

Changing a note signed by two makers and reading, "I promise to pay" to "we promise to pay," does not increase the risk or alter the obligation of the makers and does not avoid the note. Stanley v. Davis, 32 Ky. Law Rep. 1135, 107 S. W. 773.

The fraudulent substitution in a negotiable promissory note of the words "or bearer" for the words "or order" constitutes a material alteration. Builders' Lime & Cement Co. v. Weimer, 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174, S. C. secs. 14, 58.

Writing above a blank indorsement the words "protest waived" is a material alteration, and if made without the consent of the indorser, avoids the indorsement. Sawyer State Bank v. Sutherland, 36 N. D. 493, 162 N. W. 696, S. C. sec. 66.

A lead pencil entry on the back of a promissory note beneath an indorser's signature of the words "Glen Falls, N. Y.," made by the manager of the bank at which the note is payable pursuant to a custom of the bank and for the purpose of aiding its

clerks in keeping the bank record, does not constitute an alteration of the contract of indorsement which will relieve the indorser from liability. The N. I. L. was not cited. Merchants' Bank of Canada v. Brown, 86 App. Div. 599, 83 N. Y. Supp. 1037, S. C. sec. 98.

ENGLAND—

The acceptor of a bill payable to the drawer or order, when accepting, struck out the words "or order" and wrote over his acceptance the words "in favor of F (the drawer) only." *Held,* that the alteration was immaterial, the bill being still payable to order under section 8(4) B. E. A., and the acceptance was a general acceptance of a negotiable bill. Meyer v. Decroix [1891], A. C. 520. This case depends, of course, on the English Act which does not require that the instrument must be payable to order or to bearer in order to be negotiable.[1]

Consult also cases under section 124 in connection with this section.

TITLE II.

BILLS OF EXCHANGE.

ARTICLE I.

FORM AND INTERPRETATION.

Sec. 126. Bill of Exchange Defined.

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.[1]

Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, S. C. secs. 129, 152, 185; Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, S. C. secs. 71, 72-2; Brown v. Cow Creek Co., 21 Wyo. 1, 126 Pac. 886, S. C. secs. 3-2, 185.

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[1] The English Act reads "to or to the order of a specified person, or to bearer." B. E. A. s. 3 (1). Section 8 (4) also provides that "A bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

It is not necessary that an instrument be dated or that the time of payment be specified to make it a bill of exchange. If undated, the date of its issue may be shown by parol evidence and it is payable on demand if no time is specified. Lewis Hubbard Co. v. Morton, 80 W. Va. 137, 92 S. E. 252, S. C. sec. 142.

"P & P, Pay to order of X $4,000. The same to be deducted from money due me on loan on 5 houses on A street owned by L S. The amounts are to be paid as follows: $900 when buildings are rough enclosed, $1,800 when house mortared, $1,800 when complete.
Accepted P & P. L. S."

This instrument was construed to mean that the loans were to be made to L S by third parties and that the liability of the acceptors was conditional on the proceeds coming into their hands and therefore not negotiable. Tisdale Lumber Co. v. Piquet, 153 App. Div. 266, 137 N. Y. Supp. 1021.

A draft issued by a telegraph company in the following form with the blanks filled up:

"———, 190—. Pay to the order of ——— ——— dollars ———, being the sum placed to his credit by ——— at ———, receipt of which on the conditions under which the same has been transmitted is acknowledged by indorsement hereon and charge same to account of money transfers.

To the General Agent Money Transfer Dept.,
Postal Telegraph-Cable Co.

———.
Form 106 Special. Money Transfer Agent.

This draft will be cashed by ——— Bank at ———, upon identification of the payee,"

is a commercial instrument within the Negotiable Instruments Law. Postal Telegraph-Cable Co. v. Citizens' Nat. Bank, 228 Fed. Rep. 601, 143 C. C. A. 123, S. C. secs. 56, 62.

An order by a contractor, directing the owner of the building to pay another a certain sum of money and deduct it from any amount due on final payment, is not a bill of exchange. The instrument was not payable to the order of the payee. The N. I. L. was not cited. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 N. E. 138.

An order for the payment of money, addressed to no one in particular, but generally to anyone for whom the drawer might be employed or who owed him money, is too indefinite and uncertain to be binding on anyone. Dugane v. Hvezda Pokroku No. 4 (Iowa), 119 N. W. 141. The N. I. L. was not cited.

A voucher draft containing a statement of indebtedness, a receipt in the following form: "Notice, Receipt only by those having authority to sign and in ink. Paying bank will not accept unless conditions are complied with. No alterations allowed," and a statement that when properly receipted this voucher be-

comes a draft on the debtor payable through a certain bank is not negotiable but becomes so when receipted, as required, but as the signature of the payee was in pencil and not in ink the instrument was not negotiable. The N. I. L. was not cited except as "the statute." Van Blatz Brewing Co. v. Interstate Ice Co., 161 Mo. App. 531, 143 S. W. 542. The court seems to have overlooked the fact that the instrument not being payable to the order of the named payees was for that reason not negotiable and could not have been made negotiable by a proper receipt, even if such receipt would otherwise have made it negotiable.

"Spiketon, Wash., 1911, Coast Coal Co. You are hereby authorized to deduct one dollar per month from my monthly pay to pay for the services of Dr. Skeets as mine doctor." Orders in the above form were given by miners to plaintiff. *Held*, that they were substantially bills of exchange and not binding on the drawee unless accepted in writing. Skeets v. Coast Coal Co., 74 Wash. 327, 133 Pac. 433. It is submitted that these instruments not being payable to order or bearer and having no equivalent words of negotiability were not negotiable and therefore not governed by the N. I. L.

Defendant gave to plaintiff a bill of exchange payable to the plaintiff's order for work done by plaintiff. The drawee refused to pay the order. Defendant knew that the order would not be paid. The lower court held that the plaintiff could not recover from the defendant, as the order operated as an equitable assignment of the defendant's claim against the drawee and was accepted in full settlement. The judgment was reversed, because the defendant had knowledge that the order would not be paid and there was no evidence sufficient to show an express agreement on the part of the plaintiff to take the same as absolute payment and that the order did not operate as an equitable assignment. American Luxfer Prism Co. v. Bartolicius Star Iron Works, 152 N. Y. Supp. 1014.

ENGLAND—

The acceptor of bill payable to drawer or order, when accepting, struck out the words "or order" and wrote over his acceptance the words "in favor of F (the drawer) only." *Held*, that the alteration was immaterial, the bill being still payable to order under section 8(4) *supra*, p. 353, n. 1, and the acceptance was a general acceptance of a negotiable bill. Meyer v. Decroix [1891], A. C. 520. See also Bavins v. London & S. W. Bank [1900], 1 Q. B. 270, and Nathan v. Ogdens, 21 T. L. Rep. 775, *infra*, sec. 185.

A document in the form of a bill of exchange bearing no drawer's signature, but signed by the "acceptor," is not a bill of exchange in the statutory sense, but is evidence of a debt due from the acceptor to the executors of the person to whom he delivered it. Lawson's Executors v. Watson [1907], Session Cases 1353.

Sec. 127. Bill Not An Assignment of Funds in Hands of Drawee.

A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.[1]

Fulton v. Gesterding, 47 Fla. 150, 36 So. 56; Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996, S. C. secs. 3, 87, 132; Clayton Townsite Co. v. Clayton Drug Co., 20 N. M. 185, 147 Pac. 460; American Luxfer Prism Co. v. Bartolicius Star Iron Works, 152 N. Y. Supp. 1014, S. C. sec. 126; Nelson v. Nelson-Bennett Co., 31 Wash. 116, 71 Pac. 749; Wadhams v. Portland Ry. Co., 37 Wash. 86, 79 Pac. 597, S. C. sec. 132; Skeets v. Coast Coal Co., 74 Wash. 327, 133 Pac. 433, S. C. sec. 126; Plaza Farmers' Union, etc., Co. v. Ryan, 78 Wash. 124, 138 Pac. 651, S. C. sec. 132; B. & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837, S. C. sec. 189.

An unaccepted draft cashed by a bank at the drawer's request is not an assignment of the drawer's funds in the hands of the drawee. Jones v. Crumpler, 119 Va. 143, 89 S. E. 232, S. C. sec. 134.

"Please pay to S. G. Co. at the end of each month the amount due me for boarding your horses * * * until otherwise notified." *Held,* that the above instrument does not amount to an equitable assignment of the fund or render the drawee liable thereon until accepted in writing. The court cited sections 126 and 127, but overlooked the fact that the instrument was not negotiable and that therefore the statute did not apply. Frederick & Nelson v. Spokane Grain Co., 47 Wash. 85, 91 Pac. 570.

SCOTLAND—

A, having a certain sum on deposit with a bank, gave a check for a larger sum. *Held,* that the check on presentation operated as an intended assignation of the amount of the deposit. British Linen Co. Bank v. Carruthers, 10 Sess. Cas. 923.[1]

A bill accepted payable at a banker's, operates on presentment as an intended assignation of the funds of the acceptor in the banker's hands. British Linen Co. v. Rainey, 12 Sess. Cas. 825.[1]

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[1] The English Act is substantially the same except that "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time the bill is presented to the drawee." B. E. A. s. 53 (1) (2).

Sec. 128. Bill Addressed to More Than One Drawee.

A bill may be addressed to two or more drawees jointly,[1] whether they are partners or not; but not to two or more drawees in the alternative or in succession.

The Wisconsin Act omits the words "or in succession."

Sec. 129. Inland and Foreign Bills of Exchange.

An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill.[2] Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

A bill drawn in New York payable in Austria is a foreign bill. Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, S. C. secs. 152, 185.

Sec. 130. When Bill May Be Treated as Promissory Note.

Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

The Wisconsin Act omits the words "or a person" in line three.

Hannon v. Allegheny Bellevue Land Co., 44 Pa. Super. Ct. 266, S. C. sec. 186.

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1 The English Act omits the word "jointly." B. E. A. s. 6 (2).

2 "An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. For the purposes of this Act 'British Islands' mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty." B. E. A. s. 4 (1).

A draft drawn by an agent on his principal by authority of the principal is equivalent to a draft drawn by the principal on himself, and need not be accepted by the drawee. It may be treated as the promissory note or the bill of the principal. First Nat. Bank v. Home Ins. Co., 16 N. M. 66, 113 Pac. 815; C. M. Keyes Commission Co. v. Miller (Okla.), 157 Pac. 1029, not citing the N. I. L. Watauga Co. Bank v. McQueen, 130 Tenn. 382, 170 S. W. 1025; Clemens v. Staunton Co., 61 Wash. 419, 112 Pac. 494. And it is no defense that the indorsee knew that the drawer was an agent. Merchants' Bank v. Goodfellow, 44 Utah, 349, 140 Pac. 759.

Sec. 131. Referee in Case of Need.

The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

This provision is rarely inserted in English or American bills. No case involving such a provision has been found in the United States. The usual form is, "In case of need apply to A B at X." If the referee pays the bill the drawer will be liable to him for the amount. See Story on Bills, sec. 65; Daniels, Negotiable Instruments, sec. 11; Chalmers, Bills of Exchange, sec. 15.

Article II.

ACCEPTANCE.

Sec. 132. Acceptance—How Made, Etc.

The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his

promise by any other means than the payment of money.[1]

Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189; Dugane v. Ilvezda Pokroku No. 4 (Iowa), 119 N. W. 141, S. C. sec. 126; U. S. Nat. Bk. v. First Trust & Savings Bk., 60 Ore. 266, 119 Pac. 343; B. & O. R. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837, S. C. sec. 189.

A complaint which fails to allege a written acceptance of a bill of exchange does not state a cause of action against the drawee. Wadhams v. Portland Ry. Co., 37 Wash. 86, 79 Pac. 597. But Faircloth-Byrd Mercantile Co. v. Adkinson, 167 Ala. 344, 52 So. 419, is *contra* on a bill made before the N. I. L. took effect in Alabama, but under a former statute which also required an acceptance of a bill of exchange to be in writing.

But a plea which does not affirmatively disclose the fact that the contract was made by parol is a plea of a written agreement. So even though the statute required the acceptance of a bill to be in writing, a plea that the drawee "agreed to pay the order" is sufficient. Barnsdall v. Waltemeyer, 142 Fed. Rep. 415, 73 C. C. A. 515.

An oral acceptance of a bill of exchange is not binding on the drawee. Clayton Town Site Co. v. Clayton Drug Co., 20 N. M. 185, 147 Pac. 460; Ewing v. Citizens' Nat. Bank, 162 Ky. 551, S. C. sec. 189; Nelson v. Nelson-Bennett Co., 31 Wash. 116, 71 Pac. 749; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; Skeets v. Coast Coal Co., 74 Wash. 327, 133 Pac. 327, S. C. sec. 126.

The drawee of a bill of exchange drawn by Ryan wrote on it, "I return the Ryan order. Bal. of his acct. is same as order but I do not know if the hands have been paid, and will have to wait till 30 days are up. Yours truly, Wm. Binge" (the drawee). *Held*, not an acceptance. The mere admission of the correctness of the amount is not an assent to the order. Plaza Farmers' Union v. Ryan, 78 Wash. 124, 138 Pac. 651.

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[1] "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. An acceptance is invalid unless it complies with the following conditions, namely: (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money." B. E. A. s. 17 (1) (2). The English Act also has the following provision: "Where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable." B. E. A. s. 21 (1).

X, a depositor in defendant bank, gave an order on the bank to Y, who presented the order to the bank. The cashier marked the order, "presented Oct. 16, 1912, 9:05," and stamped on it, "Paid Oct. 16, 1912," and drew a check to the order of Y, but withheld it because of garnishment by a creditor of X. This case was settled, but thereafter the plaintiff, another creditor of X, instituted garnishment proceedings against X and the defendant bank. The defendant thereafter delivered and paid its cashier's check to Y. *Held,* that stamping the order given by X, "Paid," was not a payment or an acceptance thereof nor an assignment of funds of X in the bank, but that the funds still remained to the credit of X and subject to garnishment by Y, who was entitled therefore to recover of the defendant bank. Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996, S. C. secs. 3, 87.

An unaccepted order drawn upon a debtor is not effectual as an equitable assignment, unless it is drawn upon a particular fund, and not to be payable generally. Izzo v. Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744.

A telegram sent by the drawee of a draft reading, "Can not certify by wire, account amply good now," is not an acceptance. Carmichael v. Tishomingo Banking Co. (Mo. App.), 191 S. W. 1043.

A bank is not liable legally or equitably on an uncertified or unaccepted check, although the holder took the check on the faith of the oral statement of the cashier that the check was good and that it would be all right to let the drawer have goods for which the check was given to the holder. Rambo v. First Nat. Bank, 88 Kan. 257, 128 Pac. 182.

Before the delivery of a check to the payee, the latter telephoned to the drawee and asked if it was good and was told that it was. Subsequently the drawer drew all his money from the drawee bank except an amount which he left to cover the check. The bank refused to pay the check on the ground of mistake in making the statement that the check was good. The payee sued the bank on the check. *Held,* that the bank was liable to the payee for the amount of the check. Gruenther v. Bank of Monroe, 90 Neb. 280, 133 N. W. 402. It is submitted that the opinion of the three dissenting judges is to be preferred to that of the majority.

This section does not affect constructive acceptances under section 137. Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, S. C. sec. 137.

Section 132, requiring the acceptance of a bill of exchange to be in writing, does not apply to a foreign bill, payable in another state; the law of such state not having been proved, the common law, according to which such acceptance may be oral will be held to apply. Bank of Laddonia v. Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648.

Sec. 133. Holder Entitled to Acceptance on Face of Bill.

The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.[1]

This section is not confined to sight bills but is applicable to all bills of exchange. Presentment for acceptance of a bill, payable at a fixed time, is not necessary to charge the drawer or indorser, but it may be presented for acceptance at any time. National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. sec. 28.

Sec. 134. Acceptance By Separate Instrument.

Where an acceptance is written on paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.[2]

The Illinois and South Dakota Acts omit the words "to whom it is shown and" in the third line.

This section and the following section should be considered together.

The payee of checks before accepting them telegraphed to the drawee, "Will you pay W. Co. checks, fifty-nine hundred odd dollars?" to which the drawee replied, "Forward your checks. They will undoubtedly be taken care of by the company when presented" and the payee took the checks in reliance thereon. *Held,* that the drawee was liable to payee as acceptor. The N. I. L. was not cited. First Nat. Bk. of Dunn v. First Nat. Bk. of Massilon, 210 Fed. 542.

One M drew a draft to the order of plaintiff for $250 on defendant and asked the plaintiff bank to cash it. Plaintiff telegraphed to defendant asking if he would pay the draft. Defendant telegraphed to plaintiff, "Will pay M's draft on me, two-fifty for horses." Whereupon plaintiff cashed the draft. *Held,* that the telegram was an unconditional acceptance of the draft and that defendant was liable thereon. The N. I. L. was not cited. State Bank v. Bradstreet, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. 747.

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[1] Not in B. E. A.
[2] Not in B. E. A.

A telegram that a draft "is good" in answer to a telegram asking a bank if it would pay the draft is not an "acceptance" nor an agreement to accept. Colcord v. Banco der Tamaulipes, 181 App. Div. 295, 168 N. Y. Supp. 710.

Postdated checks were left by the payee with the drawee bank on the written promise of the president of the bank to send drafts for the amount on the date of the checks. The drawer had no money on deposit in the bank. *Held,* that the president had no authority to bind the bank to pay a postdated check and that the payee could not recover against the bank. Swenson Bros. v. Commercial State Bank, 98 Neb. 702, 154 N. W. 233.

A letter from the drawee to the drawer accepting a draft is not binding in favor of one who never saw the letter or advanced money on the faith of it. Jones v. Clumpler, 119 Va. 143, 89 S. E. 232, S. C. sec. 127.

A letter authorizing a draft upon certain conditions is not an acceptance if the conditions have not been complied with. *Ib.*

A letter, addressed to the payee of a draft by the acceptor, to the effect that the acceptance was to accommodate the payee in its transactions with the drawer and that the acceptor was not to be called upon to pay the same, was sent to the payee with the draft. *Held,* that there was no acceptance as to the payee and an indorsee who took with knowledge of the letter. It does not appear whether the indorsee paid value or not. Lehnhard v. Sedway, 160 Mo. App. 83, 141 S. W. 430.

Sec. 135. Promise to Accept—When Equivalent to Acceptance.

An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.[1]

The Illinois Act inserts "or after" after "before" in the second line. Bank v. Hay, 143 N. C. 326, 55 S. E. 811.

It is to be regretted that the commissioners did not take the opportunity to abrogate the rule, which had grown up in the courts of this country, and which had been made statutory in some of the states, by which collateral written acceptances of existing bills or collateral written promises to accept bills, not yet drawn, are treated as actual acceptances in favor of purchasers who take such bills on the faith of such collateral papers. Under this rule a drawee may be an acceptor as to one holder and not as to another. One who takes such a bill in ignorance of the collateral paper must either get an acceptance from the drawee in order to hold him or must get an assignment of the cause of action of a holder,

[1] Not in B. E. A.

who did take the bill on the faith of the collateral acceptance or promise. Again, suppose a holder, who knew nothing of this collateral paper should present the bill for acceptance and require that an acceptance be written on the bill and the drawee should refuse. Under section 133 the holder may treat the bill as dishonored. In such case may he sue the drawer and indorsers at once, as would ordinarily be his right and indeed his only cause of action? He would, under the English law and under our law (unlike the continental law), not have the right to wait until maturity, then present the bill for payment, and in case of refusal, sue for non-payment. And the statute of limitations would begin to run from the refusal to accept as required.[1] Again could such holder recover, as upon dishonor by non-acceptance from indorsers who had taken the bill on the faith of the collateral and as to whom the bill was an accepted bill and therefore not dishonored? The truth is that our courts have simply confused acceptances with promises to accept or collateral promises to pay a bill, which give rise to a right of action for damages in favor of the promisee in case of failure to perform, but do not give a right of action on the bill and are not negotiable.

No instrument is adapted to circulation, as negotiable, unless it contains within its four corners the information necessary to determine the liability of all the parties to it, and a negotiable bill ought to carry on its face the information which will enable the reader to know whether it has been accepted or not. And such was the English law as to inland bills since the Statute of 1 & 2 Geo. IV, c. 78, sec. 2 (1821) and as to both inland and foreign bills since the Statute of 19 & 20 Vict., c. 57, sec. 6 (1856) and is now the English law by the Bills of Exchange Act.[2]

There is still another objection to section 134. No good reason is apparent why sight of the collateral paper should be required in case of an existing bill in order that a purchaser should be able to hold the drawee, as an acceptor and not in the case of the purchaser of a bill drawn after the promise to accept. And since the Court of Appeals of New York, construing the corresponding sections of the old act from which these sections of the Negotiable Instruments Law are copied, held, that there is no reason for the distinction, that the difference in phraseology was accidental and that it is enough if the taker of the bill in either case was told or knew otherwise of the collateral paper, there was still less reason for inserting the words "to whom it is shown" in section 134.

Section 135 perpetuates a rule which has given rise to conflict and must continue to do so and therefore prevent uniformity.[3] Courts have disagreed upon the question as to how minutely the bill must be described in the collateral paper in order to constitute

[1] Whitehead v. Walker, 9 M. & W. 506; 1 Ames Cases Bills & Notes 142, 149n; 2 Daniels Negotiable Instruments, sec. 1213.

[2] "It must be written on the bill and be signed by the drawee," *supra*, p. 359, n. 1.

[3] 1 Daniels Negotiable Instruments, sec. 560 *et seq.*

an acceptance in favor of one taking the subsequently drawn bill on the faith thereof, and there is nothing in section 135 to prevent the continuance of this difference of opinion.

Although the acceptance of a bill may be conditional, a collateral written promise to acept a bill upon a condition is not an acceptance. Muller v. Kling, 149 App. Div. 176, 133 N. Y. Supp. 614, *semble*, S. C. 209 N. Y. 239, 108 N. E. 138.

Defendants, partners, sublet work for which they had a contract with M who sublet it to H, defendants agreeing with H to pay H's men. H drew orders on the defendants which plaintiff cashed at the request of one of the defendants and on his oral promise to pay them. *Held*, that defendants were not liable on the orders, but were liable because plaintiff paid the money at the request and for the benefit of defendants. Nagle v. Richards, 134 App. Div. 25, 118 N. Y. Supp. 53.

Defendant, at Muskogee, telegraphed to X authority to draw on it for a specified sum. This telegram was attached to a draft by X for said sum "with exchange" and the plaintiff bank at Tulsa, Oklahoma, relying on the telegram cashed the draft. *Held*, that there was an acceptance of the draft notwithstanding the addition of the words "with exchange" because no place of exchange was named, and the draft was payable at the residence of the drawee and there was no evidence that exchange was sought to be charged or collected. The court cited sections 132, 133, 134 but not 135 under which it properly belongs. First Nat. Bank of Tulsa v. Muskogee Pipe Line Co., 40 Okla. 603, 139 Pac. 1136, L. R. A. 1916B, 1021.

A principal's letter to his agent contained the following statement, "I think it will be well for you to draw on us at stated times, or write a few days in advance and remind us of it in order that you may not be embarrassed." *Held*, not to constitute an acceptance of any drafts the agent might draw, nor to justify a third party in believing the agent had general authority to draw drafts on principal. Bank of Morgantown v. Hay, 143 N. C. 326, 55 S. E. 811.

Sec. 136. Time Allowed Drawee to Accept.

The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.[1]

[1] "Where a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonored by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers." B. E. A. s. 42.

Where a drawee bank received a check on itself remitted by the holder, another bank, for collection, marked it paid, charged the account of the drawer and credited the amount to the holder, this was a payment of the check and the drawee bank could not rightfully cancel the paid mark and reverse the entry on its books. The N. I. L. was not cited. Consolidated Nat. Bank v. First Nat. Bank, 129 N. Y. App. Div. 538, 114 N. Y. Supp. 308, affirmed without opinion in 199 N. Y. 516.

A check was deposited by the drawer in plaintiff bank, which forwarded it through another bank to the drawee bank for collection. The drawee bank received the check October 31st and stamped the check "Paid" as of November 1st because it was the custom of the bank to close its books in the morning for the preceding day's business. The drawer had no funds in the bank at that time. No charge was made against the drawer's account, no credit to the collecting bank was entered and no notice of payment sent to it. On November 1st the drawee bank erased the word "Paid" from the check because the drawer had not made his account good, protested the check and returned it to the collecting bank, which returned it to the plaintiff, who sued the drawee bank. *Held*, that under section 136 the drawer had twenty-four hours in which to decide whether it would accept the check, that under section 189 a check is not an assignment of funds of the drawer and that the bank is not liable to the holder unless and until it accepts or certifies the check. That there was no acceptance because under section 191 delivery or notification was necessary to complete an acceptance and that the drawee bank was not liable. First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville, 127 Tenn. 205, 154 S. W. 965. It is submitted that section 136 has no application, that checks whether sent by mail or presented at the counter are presented not for acceptance but for payment, except where the drawer or the holder merely asks that the check be certified and retains the check.

See Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670, *supra*, p. 281, *contra* to this case and see also discussion under section 87, *supra*, p. 282, where a distinction is drawn between the question of liability of the bank to the holder and the question of the discharge of the drawer of a check or the maker of a note by such acts of the bank as in this and similar cases. See other cases under sections 87 and 119-3 as to the effect of marking an instrument "Paid."

Although the rules of a clearing house provided that drawee banks might return checks to the presenting bank at any time before 3 P. M., yet a bank can do so only in case it has at no time debited the check against the drawer's account. Charging the drawer's account with the check is a payment of the check, and entitles the payee to the amount, although the drawee bank after notice of suspension of the drawer, erased the charge and returned the check to the presenting bank before 3 P. M. The N.

I. L. was not cited. First Nat. Bank v. Nat. Park Bank, 100 Misc. Rep. 31, 165 N. Y. Supp. 15.

Checks and drafts were deposited in a trust company so as to become the property of the company, which transferred them to a bank for collection under an arrangement whereby the bank as soon as it received the checks, mingled them with its general funds and sent the trust company a check for the amount. *Held,* that the bank became the owner of the checks sent to it for collection. The N. I. L. was not cited. German Nat. Bank v. Carnegie Trust Co., 172 App. Div. 158, 158 N. Y. Supp. 222.

Sec. 137. Liability of Drawee Retaining or Destroying Bill.

Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

The Illinois and South Dakota Acts omit the provisions of this section.

The Wisconsin Act adds "Mere retention of the bill is not an acceptance." See Wisner v. First Nat. Bank, *infra,* pp. 367, 368 this section for Pennsylvania amendment.

AMES: It is a perversion of language to say that a refusal to accept is an acceptance. The holder might sue the drawee because of his fictitious acceptance and the drawer because of the drawee's non-acceptance. The drawee should only be held for conversion of the bill as in England.

BREWSTER: The provision was taken from the statutes of eight States, including New York. The bankers regarded it as a simple practical working rule.

COHEN: The section is imperfect. It would imply that if the bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This ought not to be the law.

McKEEHAN: How can the holder bring concurrent actions? He may sue the drawee as acceptor, but the bill being treated as accepted, not the drawer, unless the bill is dishonored for non-payment. But there is force in Mr. Cohen's objection. Also on principle a destruction or refusal to return the bill is a conversion and not an acceptance.

In order to hold a drawee as acceptor under this section, the burden is upon the plaintiff to show that the instrument was negotiable paper of the nature and kind that could be presented for acceptance or that it was actually delivered to the drawee for acceptance and not for payment. So presentment of a sight draft for payment is not delivery for acceptance and does not come within section 137, and a destruction or refusal to return such draft is not an acceptance. First Nat. Bank of Omaha v. Whitmore, 177 Fed. Rep. 397, 101 C. C. A. 401.

In Westberg v. Chicago Lumber Co., 117 Wis. 589, 94 N. W. 572 it was said that the mere retention of a bill by the drawee is not an acceptance. Either destruction or a refusal to return to the holder should be shown. The Wisconsin statute adds the words "mere retention of the bill is not an acceptance." But even without these words the same construction was put upon former statutes which were substantially the same as section 137, N. I. L. See Matteson v. Moulton, 79 N. Y. 627; Dickinson v. Marsh, 57 Mo. App. 566; St. Louis & S. W. Ry. Co. v. James, 78 Ark. 490, 95 S. W. 804. But State Bank v. Weiss, 46 Misc. Rep. 93, 91 N. Y. Supp. 276, is *contra* under the N. I. L., and in Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, S. C. sec. 132, it was held that under section 137 N. I. L., the presentation for acceptance is a demand for acceptance which, if the bill is retained by the drawee, implies a demand for its return if acceptance is declined, and that the mere failure to return the bill within twenty-four hours is an acceptance. And it was further held that under section 185 a check was subject to the same rules, and that failure to return within twenty-four hours a check sent to a drawee bank for payment was an acceptance of the check upon which the holder could recover against the bank, although the delay was due to the neglect of a notary public to whom the check was handed by the drawee bank to protest on the day of its receipt by the bank.

The delivery of a check by a bank to a notary public for protest is not a compliance with this section and does not relieve the drawee from liability, following Wisner v. First Nat. Bank; Provident S. & B. Co. v. First Nat. Bank, 37 Pa. Super. Ct. 17.

It is submitted that these decisions are erroneous, section 137 having no application to a check which was not presented for acceptance or certification, but for payment. But the case illustrates the evil possibilities of the section in the case of a check presented for certification (which by section 187 is equivalent to

an acceptance), and inadvertently retained more than twenty-four hours. This danger has, however, been averted for the future in Pennsylvania by an amendment to the section (Laws of 1909, Act 169, April 27, 1909) which provides that "the mere detention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance: And provided further, that the provisions of this section shall not apply to checks."

This amendment restores the former rule of construction put upon the old statutes from which section 137 is copied and makes a demand for the return of the bill and a refusal necessary in order to constitute an acceptance. But the amendment does not cure another objection to this section, not mentioned by Prof. Ames in his criticism. A demand for the return of a bill could certainly not be made within the twenty-four hours which the drawee was entitled to retain it, and if the demand is made after the expiration of the twenty-four hours, and the drawee then re-refused to return it, he can not be said "to refuse *within* twenty-four hours after such delivery." If he is not bound to return so as to make his refusal an acceptance without a demand, and if the demand can not be made until after twenty-four hours, the provision seems to be incapable of operation, and the act should be changed to read: "after the expiration of twenty-four hours." Another criticism may be made upon the section. By the custom and merchants and the common law, the drawee was entitled to twenty-four hours in which to decide whether to accept a bill or not, and such is also the provision of section 136. It could hardly have been the purpose of the draftsman of the act to allow the latter to shorten this time and the word "other" in section 137 was without doubt inadvertently used and should be changed to "longer."

In Union Nat. Bank v. Franklin Nat. Bank, 249 Pa. 375, 94 Atl. 1080, S. C. sec. 62, it was held under the Pennsylvania Amendment of 1909 that a bank which has paid a check drawn upon it without accepting it is not an acceptor in the sense that it is precluded by section 62 from disputing the genuineness of the drawer's signature.

The case of Wisner v. First Nat. Bank was followed in People's Nat Bank v. Swift, 134 Tenn. 175, 183 S. W. 725, S. C. sec. 189, in which case this court also commits the error of failing to distinguish between the presentment of a check or bill for payment and the presentment of a bill for acceptance or a check for certification.

And in Standard Trust Co. v. Commercial Nat. Bank, 166 N. C. 112, 81 S. E. 1074, the court discussed the question involved in the case of Wisner v. First Nat. Bank, with an apparent leaning in favor of that decision, but the case was disposed of on the ground of error in refusing to leave to the jury the question of the liability of the drawee bank to which the check had been sent for collection on the ground of failure to use due diligence in collection.

A bill was left with the drawee for acceptance. The drawee said it was all right and later confirmed this by telephone. When the holder called for the bill the drawee said it had been thrown in the waste basket and burned up and he refused to pay it. *Held,* that an accidental destruction would not be an acceptance, but if the jury found that it was willful the drawee would be liable. Bailey & Co. v. S. W. Veneer Co., 126 Ark. 257, 190 S. W. 430.

A bank paid a check on a forged indorsement of the payee's name and charged the drawer's account. The payee sued the bank. *Held,* that the bank was liable as an acceptor of the check. Chamberlain Metal, etc., Co. v. Bank of Pleasanton, 98 Kan. 611, 160 Pac. 1138.

There is a double objection to this case: first, section 137 does not apply to checks presented for payment; second, the court failed to distinguish between presentation or delivery for acceptance and presentment for payment. The check was not delivered for acceptance either by the payee or by the wrongful possessor. If the bank refused to return the check to the payee, his remedy was an action for conversion of the check. See cases cited under section 189, *infra,* p. 405.

It is evident from the foregoing cases that uniformity of decision can not be hoped for under section 137. The Illinois and South Dakota acts omit this section altogether. In the Federal Court it has been held that this section does not apply to a sight draft presented for payment. In Pennsylvania the amendment of 1909 expressly excepts checks from its operation and makes a demand necessary. In Tennessee, North Carolina and Kansas, the act is applied to checks presented for payment or acceptance. In Arkansas, although there was a demand and refusal to return a check which had been destroyed by the drawee, it was held that if the destruction was wilful there was an acceptance, but not if the destruction was accidental.

In order to cure the evils of this section, and in the interest of uniformity, it has been suggested that it should be amended so as to read: "Section 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses *after the expiration* of twenty-four hours after such delivery or such *longer* period as the holder shall allow, to return the bill, accepted or non-accepted, to the holder, he will be deemed *to have converted the same and shall be liable in damages for the amount of the bill.*" [1]

Sec. 138. Acceptance of Incomplete Bill.

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a

[1] Brannan, Some Necessary Amendments of Negotiable Instruments Law, 26 Harvard Law Rev. 596.

previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

In South Dakota the word "payable" is inserted between "bill" and "accepted" in the last clause, an evident error.

Sec. 139. Kinds of Acceptances.

An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

England—
Meyer v. Decroix [1891], A. C. 520, S. C. sec. 125.

Sec. 140. What Constitutes a General Acceptance.

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

Sec. 141. Qualified Acceptance.

An acceptance is qualified, which is:—

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;(*a*)
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular[1] place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

[1] The English Act interpolates "specified." B. E. A. s. 19 (2) (c).

(*a*) A telegram addressed to plaintiff as follows: "Will pay McMillan's draft on me for two-fifty for horses," is an unconditional acceptance and plaintiff, cashing the draft, is not bound to see that the proceeds are used for horses. The N. I. L. was not cited. State Bank of Beaver Co. v. Bradstreet, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. (N. S.) 747.

Defendant telegraphed to X as follows: "Will honor your draft, fifteen hundred dollars, telegram attached." X thereupon drew a draft for said amount to the order of plaintiff and indorsed it to plaintiff with the above telegram attached, and was paid the money by plaintiff. *Held,* that the telegram was an unconditional acceptance of the draft on which defendant was liable to plaintiff, even though defendant intended a different telegram to be attached to the draft. Ensign v. Clark Cutlery Co., 195 Mo. App. 584, 193 S. W. 961.

Defendant signed the following instrument: "Rec'd from Milwaukee Co. an order from F. Anderson to pay their note of $400, as soon as proceeds of sale of hardware is available which I will do." *Held,* not an absolute acceptance of an order to pay another's debt, but a qualified or conditional acceptance; defendant's liability depending on the happening of the condition. The N. I. L. was not cited. Milwaukee Corrugating Co. v. Traylor, 95 Kan. 562, 148 Pac. 653.

Sec. 142. Rights of Parties as to Qualified Acceptance.

The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto.[1] When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

[1] The English Act adds: "The provisions of this subsection do not apply to a partial acceptance whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance." B. E. A. s. 44 (2).

The payee of a bill took an acceptance, payable when lumber was inspected and placed to the credit of the payer, but gave no notice thereof to the drawer. *Held* that the drawer was discharged. Lewis Hubbard & Co. v. Morton, 80 W. Va. 137, 92 S. E. 252, S. C. sec. 126.

ARTICLE III.

PRESENTMENT FOR ACCEPTANCE.

Sec. 143. When Presentment for Acceptance Must Be Made.

Presentment for acceptance must be made:—

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument;[1] or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189.

Sec. 144. When Failure to Present Releases Drawer and Indorser.

Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers[2] are discharged.[3]

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[1] The English Act omits the words "or in any other case where." B. E. A. s. 39 (1).

[2] The English Act interpolates "prior to that holder." B. E. A. s. 40 (2).

[3] B. E. A. s. 40 (1), corresponding to the above section 144, relates only to bills payable after sight.

Sec. 145. Presentment—How Made.

Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance [1] for all, in which case presentment may be made to him only;
2. Where the drawee is dead, presentment may be made to his personal representative;
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.[2]

Subsection 2 seems to be merely permissive since by section 148-1 presentment is excused where the drawee is dead. But since there is no section which excuses presentment in case the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, the word "may" in section 145-3 indicates merely a permission to adopt either one of the two alternative methods of presentment stated—not a permission to omit presentment altogether.

Sec. 146. On What Days Presentment May Be Made.

A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.[3]

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[1] The words "or refuse acceptance" are omitted in B. E. A. s. 41 (1) (b).

[2] "Where the drawee is bankrupt, presentment may be made to him or to his trustee." B. E. A. s. 41 (1) (d).

[3] Not in B. E. A. The Bank Holidays Act, 1871, s. 2, provides that when the day on which a bill should be presented for acceptance is a bank holiday, the bill shall be presented the next day. Chalmers' Bills of Exchange, 6th ed., 348, see also B. E. A. s. 92, *infra*, p. 414, n. 1.

The Arizona, Kentucky and Wisconsin Acts omit the last sentence, and in North Carolina the last sentence was stricken out by amendment, Laws 1909, ch. 800, and it was enacted that "there shall be no difference between Saturday and any other secular or business day, as far as negotiable instruments are concerned."

The Colorado Act substitutes for the last sentence the following: "When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday."

Sec. 147. Presentment Where Time is Insufficient.

Where the holder of a bill, drawn payable elsewhere than at the place of business or the residence of the drawee, has not time with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

Sec. 148. Where Presentment is Excused.

Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:—

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.[1]
2. Where, after the exercise of reasonable diligence, presentment can not be made.
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.[2]

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[1] "Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill." B. E. A. s. 41 (2) (a).

[2] The English Act adds: "The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment." B. E. A. s. 41 (3).

Sec. 149. When Dishonored By Non-Acceptance.

A bill is dishonored by non-acceptance:—

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or can not be obtained; or
2. When presentment for acceptance is excused, and the bill is not accepted.

National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 28, 133.

Sec. 150. Duty of Holder Where Bill Not Accepted.

Where a bill is duly presented for acceptance and is not accepted within the prescribed[1] time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 28, 133.

Sec. 151. Rights of Holder Where Bill Not Accepted.

When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

National Park Bank v. Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927, S. C. secs. 28, 133.

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[1] The English Act uses the word "customary" instead of "prescribed." B. E. A. s. 42.

ARTICLE IV.

PROTEST.

Sec. 152. In What Cases Protest Necessary.

Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.[1]

The liabilities of the drawer of a bill of exchange are fixed by the law of the place where he draws it. So a bill drawn in New York and payable in Austria is a foreign bill (sec. 129), and must be protested in order to hold the drawer, although by the law of Austria no protest is required. Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, S. C. in Appellate Division, secs. 129, 185; Casper v. Kuhne, 79 Misc. Rep. 411, 140 N. Y. Supp. 86, accord.

But where a bill drawn by defendant in Kansas City on a bank in London, England, was paid by the drawee in good faith and in the ordinary course of business but on a forged indorsement of the payee and under section 60 of the Bills of Exchange Act (*infra*, p. 554) such payment is deemed to have been made in due course, the payee can not recover from the drawer the amount paid for such bill. The question as to what constituted a legal payment was governed by the law of the place of performance and it is to be assumed that the drawer issued the bill and the payee took it with a view to that law. The N. I. L. was not cited. Belestin v. First Nat. Bank, 177 Mo. App. 300, 164 S. W. 160.

The former statute whereby promissory notes, payable and negotiable at a bank and discounted by a bank, are placed on the same footing as foreign bills of exchange is repealed by the Negotiable Instruments Law. Therefore protest of such a note is not required. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350, S. C. secs. 66, 68, 107, 184. But the Negotiable Instruments Law which makes a note negotiable

[1] For definition of foreign and inland bills, see section 129. As to protest of inland bills and promissory notes, see section 118.

by indorsement or delivery, *ipso facto,* places it on the same footing as a bill of exchange and subject to the Statute of Limitations of five years for actions on bills of exchange or promissory notes placed upon the footing of bills of exchange. Pensacola Bank v. Thornberry, 226 Fed. Rep. 611, 141 C. C. A. 367 and cases cited, S. C. sec. 52.

The Negotiable Instruments Law making no provision as to the damages recoverable in actions on foreign bills of exchange this subject is relegated to the Law Merchant under section 196.

The subject has been considered in the following cases.

The damages recoverable by the payee of a negotiable foreign bill of exchange protested for non-payment against the drawer may be deemed to be made up as follows: (1) The face of the bill; (2) interest thereon; (3) protest fees; (4) re-exchange, *i. e.,* the additional expense of procuring a new bill for the same amount payable in the same place on the day of dishonor; or a percentage in lieu of such re-exchange in jurisdictions where it is prescribed by statute.

A bill drawn in Columbia and payable in New York in United States money was dishonored. Subsequently the drawee paid in New York the principal sum with interest and protest fees, without prejudice to the right of the holder to recover re-exchange. In an action by the holder against the drawer, who was also drawee. *Held,* that the measure of damages to the payee upon its refusal to pay is the amount of the draft, with interest and protest fees. This is true although the currency of the country in which the bill was drawn depreciated after the date of the bill and its dishonor, so that the holder was required to pay a larger number of dollars in such depreciated currency for the amount of American money for which the bill was drawn than he was able to realize upon the draft in the country where it was drawn in the first instance. Pavenstedt v. N. Y. Life Ins. Co., 203 N. Y. 91, 96 N. E. 104, Ann. Cas. 1913A, 805.

By the law merchant the holder of a dishonored foreign bill of exchange is entitled to recover of the drawer re-exchange, which is the price that the holder must pay on the date of dishonor, in the currency of the country, where the original bill was drawn, payable where the original bill was payable, for a good bill, of the same amount of money and this rule is not changed by the fact that at the date of the trial, the value of the foreign currency had depreciated in the market of the country where the bill was drawn. Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 N. E. 636, S. C. secs. 79, 82, 109.

The defendants, residing in England, accepted bills drawn by and payable in marks to the plaintiff, at Leipzig, Germany. In an action on the bills, held, that the plaintiffs are entitled to recover a sum in United States money sufficient to purchase the marks at the time of maturity of the bills with protest fees and interest at six per cent. until the entry of judgment, and not the value of the marks at the time of the trial. The N. I. L. was not cited. Gross v. Mendel, 171 App. Div. 237, 157 N. Y. Supp. 357.

Sec. 153. Protest—How Made.

The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:—

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.[1]

A certificate of the protest of a foreign bill of exchange is no proof of the drawee's refusal to accept or pay the bill, unless properly authenticated by the seal of the officer before whom the protest was made.

In an action upon an alleged protested bill of exchange, drawn upon a resident of Brazil where the law provides that "bills of exchange must be protested before the proper protest officer, if there be such," the certificates of protest offered were not authenticated under seal and it did not appear whether or not there was in fact any "proper protest officer" nor whether according to the law of Brazil the officer before whom protest was made had a seal or was required to use one in taking protests. *Held*, that the liability of the drawer of the bill was not established. London & River Plate Bank v. Carr, 54 Misc. Rep. 94, 105 N. Y. Supp. 679.

Sec. 154. Protest—By Whom Made.

Protest may be made by,—

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.[2]

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[1] "A protest must contain a copy of the bill, and must be signed by the notary making it and must specify (a) The person at whose request the bill is protested; (b) The place and date of protest, the cause or reason for protesting the bill, the demand made and the answer given, if any, or the fact that the drawer or acceptor could not be found." B. E. A. s. 51 (7).

[2] "Where a dishonored bill or note is authorized or required to be protested, and the services of a notary can not be obtained at the place where the bill is dishonored, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonor of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill." B. E. A. s. 94. A form of protest which may be used in such case is given in the first schedule to the Act.

In Arkansas and in Washington, "responsible" was substituted for "respectable" in subsection 2, but later in Washington, Remington's Codes and Statutes, 1915, "respectable" was used with "responsible" following it in parenthesis.

Sec. 155. Protest—When to Be Made.

When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.[1]

Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. Supp. 87, S. C. sec. 185.

The drawer of a check, who has countermanded payment, is not entitled to notice of its protest. First Nat. Bank v. Korn (Mo. App.), 179 S. W. 721, S. C. secs. 63, 71.

SCOTLAND—

A bill was protested on 25th September, but noting on the bill was 24th September. The extended protest dated 25th September contained 25th September as date of noting. The protest was held invalid. M'Pherson v. Wright, 12 Sess. Cas. 942.

Sec. 156. Protest—Where Made.

A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

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1 "Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting." B. E. A. s. 51 (4). "For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting." B. E. A. s. 93.

Sec. 157. Protest Both for Non-Acceptance and Non-Payment.

A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 158. Protest Before Maturity Where Acceptor Insolvent.

Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.[1]

Sec. 159. When Protest Dispensed With.

Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Sec. 160. Protest Where Bill is Lost, Etc.

When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925, S. C. sec. 186.

Where checks were indorsed without restriction and deposited in the defendant bank, which credited the amount to the depositor's

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[1] "Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers." B. E. A. s. 51 (5). The English Act has the additional provision: "When a bill is presented through the post office and returned by post dishonored, it may be protested at the place to which it is returned and on the day of its return, if received during business hours, and if not received during business hours, then not later than the next business day." B. E. A. s. 51 (6) (a).

account and mailed them to its correspondent for collection, were lost in the mail, and not found until after the drawer became bankrupt, the bank must stand the loss and can not charge the amount of the checks to the depositor's account, because the defendant held the checks as owner and not as mere agent for collection and, although it might have charged back the amount if the checks had been dishonored, they were not dishonored and the loss was due to the failure of defendant to attempt to collect them as lost paper. Heinrich v. First National Bank of Middletown, 219 N. Y. 1, 113 N. E. 531.

ARTICLE V.

ACCEPTANCE FOR HONOR.

Sec. 161. When Bill May Be Accepted for Honor.

Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.[1]

Sec. 162. Acceptance for Honor—How Made.

An acceptance for honor *supra* protest must be in writing,[2] and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

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[1] The provision in the last clause for a further acceptance by a different person for the honor of another party is not in the English Act; see s. 65 and s. 65 (2).

[2] The English Act reads, "must be written on the bill." B. E. A. s. 65 (3).

Sec. 163. When Deemed to Be An Acceptance for Honor of the Drawer.

Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Sec. 164. Liability of the Acceptor for Honor.

The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 165. Agreement of Acceptor for Honor.

The acceptor for honor, by such acceptance engages that he will, on due presentment, pay the bill according to the terms [1] of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor [2] given to him.

Sec. 166. Maturity of Bill Payable After Sight—Accepted for Honor.

Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

AMES: Section 166 enacts that the maturity of an acceptance for honor of a bill payable after sight shall be calculated from the date of the noting for non-acceptance, and not, as was erroneously decided in Williams v. Germaine,[3] from the date of the acceptance for honor.

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[1] The English Act uses "tenor" instead of "terms." B. E. A. s. 66 (1).
[2] The English Act reads "notice of these facts." B. E. A. s. 66 (1).
[3] 7 B. & C. 468.

Sec. 167. Protest of Bill Accepted for Honor, Etc.

Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Sec. 168. Presentment for Payment to Acceptor for Honor—How Made.

Presentment for payment to the acceptor for honor must be made as follows:—

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.[1]

In North Carolina the words "in this chapter specified" are substituted for "section one hundred and four" in subsection 2.

Sec. 169. When Delay in Making Presentment is Excused.

The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 170. Dishonor of Bill By Acceptor for Honor.

When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

[1] "Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him." B. E. A. s. 67 (2).

ARTICLE VI.

PAYMENT FOR HONOR.

Sec. 171. Who May Make Payment for Honor.

Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

In Hooper v. Herring (Ala.), 70 So. 308, S. C. sec. 91, the drawer of a dishonored check paid the amount to the payee and took up the check. The court, citing this section, said that the drawer had a right to intervene and pay it to protect his honor. This seems an improper application of the section. The drawer did not pay for honor but to discharge his obligation to the payee. This would give him no rights against the drawee on the check, but only for damages for the dishonor of the check and it was for this that he sued.

Sec. 172. Payment for Honor—How Made.

The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

Sec. 173. Declaration Before Payment for Honor.

The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Sec. 174. Preference of Parties Offering to Pay for Honor.

Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Sec. 175. Effect on Subsequent Parties Where Bill is Paid for Honor.

Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

AMES: This section codifies, as does the English Act, evidently by an oversight, the overruled case of *ex parte Lambert*. It should be amended by substituting for "liable" the fourth word from the end, the word "prior."

BREWSTER: *Ex parte Lambert* was the law in several States, and seems just.

MCKEEHAN: It is doubtful whether the change in the English rule was inadvertant. The rule enacted by this section is probably the more just one.

The rule codified in this section has the advantage of preventing circuity of action, since if the party for whose honor the payment is made, should, as between himself and the party sued, be the one who ought to pay the bill, the party sued, upon payment to the payer for honor could recover against the party for whose honor the bill was paid. It also seems more logical that one who pays for the honor of a particular party should put himself in the place of that party. Ed.

Sec. 176. Where Holder Refuses to Receive Payment Supra Protest.

Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

Sec. 177. Rights of Payer for Honor.

The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental

to its dishonor, is entitled to receive both the bill itself and the protest.[1]

Article VII.

Bills in a Set.

Sec. 178. Bills in Sets Constitute One Bill.

Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Caras v. Thelman, 138 App. Div. 297, 123 N. Y. Supp. 97, S. C. sec. 183; Casper v. Kuhne, 159 App. Div. 389, 144 N. Y. Supp. 502, S. C. sec. 183.

Sec. 179. Right of Holders Where Different Parts are Negotiated.

Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Sec. 180. Liability of Holder Who Indorses Two or More Parts of a Set to Different Persons.

Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

[1] The English Act adds, "If the holder do not on demand deliver them up, he shall be liable to the payer for honor for damages." B. E. A. s. 68 (6).

Sec. 181. Acceptance of Bills Drawn in Sets.

The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course,[1] he is liable on every such part as if it were a separate bill.

Sec. 182. Payment By Acceptor of Bills Drawn in Sets.

When the acceptor of a bill drawn in a set, pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Sec. 183. Effect of Discharging One of a Set.

Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

The Wisconsin Act here inserts two sections, entitled "Damages on Bills," as follows:

"Sec. 1682. Whenever any bill of exchange drawn or indorsed within this State and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same as the current rate of exchange at the time of the demand and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses.

"Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this State, but within some State or Territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or endorser thereof, due notice being given of such non-acceptance or non-payment, shall

[1] The English Act reads, "get into the hands of different holders in due course." B. E. A. s. 71 (4).

pay said bill with legal interest, according to its tenor and five per cent. damages, together with costs and charges of protest."

Two parts of a bill of exchange drawn in a set in New York on a drawee in Paris were mailed in separate covers to the payees in Spain. Only the second part of the bill was received. This was indorsed by the payees, negotiated and presented to the drawee and payment refused, because the first part, which was apparently regularly indorsed by the payees and several other persons, had been previously presented and paid in good faith. One notice of dishonor was given to the drawer and the indorsee of the payees sued the drawer. The French Code of Commerce provided that "The party who pays a bill of exchange at its maturity and without opposition is presumably discharged." *Held*, that as the validity of the payment was governed by the law of the place of performance and as by the French Code the payment of the first part of the bill was valid, although the endorsements were forged, and the drawer was therefore discharged, a complaint which set forth the above facts was demurrable. Caras v. Thalmann, 138 App. Div. 297, 123 N. Y. Supp. 97; Casper v. Kuhne, 159 App. Div. 389, 144 N. Y. Supp. 502, accord.

TITLE III.

PROMISSORY NOTES AND CHECKS.

ARTICLE I.

Sec. 184. Promissory Note Defined.

A negotiable[1] promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.[2](*a*) Where a note is drawn to the maker's own order, it is not complete until indorsed by him.(*b*)

(*a*) Young v. American Bank (No. 1), 44 N. Y. Misc. Rep. 305, 89 N. Y. Supp. 913; Young v. American Bank (No. 2), 44 N. Y.

[1] "Negotiable" is omitted in the English Act. B. E. A. s. 83 (1).

[2] The English Act reads, "a sum certain in money to, or to the order of a specified person or to bearer." B. E. A. s. 83 (1) and see also section 8 (4), *supra*, p. 353, n. 1.

Misc. Rep. 308, 89 N. Y. Supp. 915; Brown v. Cow Creek Co., 21 Wyo. 1, 126 Pac. 886.

A certificate of deposit in the ordinary form ("payable on the return of this certificate properly indorsed") is a negotiable instrument within the provisions of the N. I. L. Forrest v. Safety Banking & Trust Co., 174 Fed. 345; National City Bank v. Titlow, 233 Fed. 838; ("payable to the order of ourselves, on return of this certificate properly indorsed") Jensen v. Wilslef, 36 Nev. 37, 132 Pac. 16.

"STOCKHOLDER'S PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron stallion named, etc., we, the undersigned subscribers, hereby purchase said stallion of A. C. Ruby Co., etc.

$2,800.00 PORTLAND, OREGON, Feb. 14, 1911.

For value received, I promise to pay to the order of the A. C. Ruby Co. the sum of twenty-eight hundred dollars in payment as follows, etc.

T. S. P.
H. S."

Held, a purchasing contract and not a promissory note. The N. I. L. was not cited. Leiter v. Poindexter, 220 Fed. Rep. 610, 136 C. C. A. 68.

An instrument reading "Having been cause of a money loss to my friend X, I have given her three thousand dollars. I hold this amount in trust for her and one year after date or thereafter, on demand, I promise to pay to the order of X, her heirs or assigns, three thousand dollars with interest" is a valid promissory note. As it does not appear upon the face that there was no consideration or an invalid consideration, it will be presumed that there was a valid consideration. In the absence of evidence to the contrary the court must assume that the money loss referred to was legally chargeable to the maker. Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059.

The Negotiable Instruments Law has changed the rule (statutory) in Kentucky which made promissory notes assignable, but subject to all defences in the hands of the assignor before notice of the assignment, unless the note was payable and negotiable at a bank in Kentucky and indorsed to and discounted by a bank in Kentucky, and has put promissory notes on the footing of bills of exchange and so not subject to equities as against a holder in due course. Williams v. Paintsville Nat. Bank, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350, S. C. secs. 66, 68, 107, 152; Gahren v. Parkersburg Nat. Bank, 157 Ky. 266, 162 S. W. 1135; Pratt v. Rounds, 160 Ky. 358, 169 S. W. 848, S. C. secs. 56, 124.

And the abrogation of such former statute has also had the effect of changing the limitation of actions against a surety on such a note from five years to seven years. Southern Nat. Bank v. Schimpler, 159 Ky. 372, 167 S. W. 148.

And where a note was not negotiated before maturity it was not "placed on the footing of a bill of exchange" and therefore was not affected by the five year limitation of actions upon notes placed on the footing of bills of exchange prescribed by Ky. St., sec. 2515. Sim v. Citizen's Bank, 173 Ky. 799, 191 S. W. 489.

Instruments, otherwise negotiable in form, sometimes contain a provision "that the maker and indorsers severally waive presentment and notice of protest, and consent that time of payment may be extended without notice" or that "no extension of time of payment with or without our knowledge by the receipt of interest or otherwise shall release us or either of us from the obligation of payment," or "that after maturity this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us and after such extension the liability of all parties shall remain as if no such extension had been made" or similar provisions. In the great majority of cases since the Negotiable Instruments Law, such provisions have been held not to impair the negotiability of the instrument.

Navajo County Bk. v. Dolson, 163 Cal. 485, 126 Pac. 153; Longmont Nat. Bk. v. Loukonen, 53 Colo. 489, 127 Pac. 947, Ann. Cas. 1914B, 208; Stitzel v. Miller, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412; Farmer, Thompson & Helsell v. Bank, 130 Iowa 469, 107 N. W. 170; Wolfboro L. & B. Co. v. Rollins, 195 Mass. 323, 81 N. E. 204; City Nat. Bk. v. Goodloe-McClelland Com. Co., 93 Mo. App. 123; Davis v. McColl, 176 Mo. App. 198, 166 S. W. 1113; First Nat. Bk. v. Balchrim, 100 Neb. 25, 158 N. W. 371; First Nat. Bank v. Stover, 21 N. M. 453, 155 Pac. 905, L. R. A. 1916D, 1280; First Nat. Bk. of Pomeroy v. Buttery, 17 N. D. 226, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 52; Missouri Trust Co. v. Long, 31 Okla. 1, 120 Pac. 291; DeGroat v. Focht, 37 Okla. 267, 131 Pac. 172; City Nat. Bk. v. Kelly (Okla.), 151 Pac. 1172; Bank v. White, 136 Tenn. 634, 191 S. W. 332.

The following cases are *contra*, but it is submitted that they are wrong: Union Stockyards Nat. Bank v. Bolan, 14 Idaho 87, 93 Pac. 508, 125 American State Rep. 146; Rossville State Bank v. Heslet, 84 Kan. 315, 113 Pac. 1052.

In Cedar Rapids Nat. Bank v. Weber (Iowa), 164 N. W. 233, a clause reading: "All parties to this note, including sureties, indorsers, and guarantors, hereby severally waive presentment for payment, notice of non-payment and protest, and consent to extensions of time on this note" was construed to mean that the payee or holder was bound in advance to consent to any extension

of time which the maker might demand and, as no period of extension was fixed, the note was uncertain as to time and therefore not negotiable. *Sed quaere?* This construction seems forced. An extension could hardly be made otherwise than by agreement of the holder and maker at some certain time and for some definite time, and the clause was evidently intended to operate as a waiver by the parties secondarily liable. See First Nat. Bank v. Stover, 21 N. M. 453, 155 Pac. 905, L. R. A. 1916D, 1280, *infra,* p. 391, S. C. sec. 56.

In Quinn v. Bane (Iowa), 164 N. W. 788, the court held that because of its holding in Cedar Rapids Nat. Bank v. Weber, *supra,* that a clause giving the consent of the payee or holder to extensions made the note non-negotiable, it must hold the note in suit to be non-negotiable. But in this note the provision was different. It read "The maker, sureties, and guarantors of this note severally waive presentment for payment, notice of non-payment, protest, notice of protest, and diligence in bringing suit against any party hereto, and consent that the time of payment may be extended from time to time without notice thereof." Quinn v. Bane was followed in Manhard v. First Nat. Bank (Iowa), 165 N. W. 185 without discussion.

The court in these Iowa cases seems to have been influenced by the case of Woodbury v. Roberts, 59 Iowa 348, in which case the note had a clause that "the makers and indorsers of this obligation further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely as he or they may see fit."

But this note was a trick, since the payee and the maker were the same person. The maker therefore had power to extend his own note indefinitely so that its payment was optional as he could extend it forever.

A provision that "all parties hereto * * * agree that this note may be extended from time to time by any one or more of us, without the knowledge or consent of any of the others of us, and after such extension, the liability of all parties shall remain as if no such extension had been made" does not authorize the makers or other parties to extend the time of payment without the consent of the payee or holder. First Nat. Bank v. Stover, 21 N. M. 453, 155 Pac. 905, L. R. A. 1916D, 1280.

A provision that sureties consented that the time of payment of a note might be extended without notice thereof does not apply to joint makers and since there were no other parties to whom it could apply it can not affect the negotiability of the note. Smith v. Nelson Land & Cattle Co., 212 Fed. Rep. 56, 128 C. C. A. 512, S. C., secs. 4-2, 25, 58, 191.

A note is not rendered non-negotiable by (1) a stipulation whereby the makers, indorsers, guarantors and sureties consent that the time of payment may be extended without notice; (2) a stipulation that the note shall immediately become due and pay-

able, if the maker should fail in business or ask a respite or become bankrupt before the maturity of the note; or (3) a stipulation that, if the note be not paid at maturity, any money, stocks, bonds, or other property on deposit or otherwise to the credit of the maker or any indorsers on the books of the bank at which the note is made payable shall at once stand applied to its payment. Hibernia Bank & Trust Co. v. Dresser, 132 La. 538, 61 So. 569; explained and qualified, Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 63, 192.

The indorser was not released because more than one extension was made, since the agreement did not deprive him of the right at maturity of the note or of any extension thereof to pay the note and become subrogated to an action against the maker. *Ib.*

A clause in a note consenting "that the time of payment may be extended without notice thereof" is satisfied by one extension. If more than one is given without consent of the surety he will be discharged. But if after extensions have been granted the surety accepts security to protect himself he waives the extensions and is estopped to assert his release by extensions made without his consent. The N. I. L. was not cited. Kremke v. Radamaker (Okla.), 159 Pac. 475.

But if the words "any extension of time of payment" are used in such a clause this indicates that one or more extensions are contemplated. The N. I. L. was not cited. Pioneer Construction Co. v. First State Bank (Okla.), 158 Pac. 894.

ENGLAND—

An instrument in the form of a joint and several promissory note contained the clause, "No time given to, or security taken from, or composition or arrangement entered into, with either party hereto shall prejudice the rights of the holder to proceed against any other party." *Held*, a valid promissory note within section 83 (1),[1] Kirkwood v. Carroll [1903], 1 K. B. 531, overruling Kirkwood v. Smith [1896], 1 Q. B. 582, and approving Yates v. Evans, 61 L. J. Q. B. 446.

(*b*) Sherman v. Goodwin, 11 Arizona 141, 89 Pac. 517; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886, S. C. secs. 64-1, 109; Moore v. Cary, 138 Tenn. 332, 197 S. W. 1093, S. C. sec. 17-6.

A complaint on a note payable to the maker's order which fails to allege indorsement by the maker is defective. Simon v. Mintz, 51 Misc. Rep. 670, 101 N. Y. Supp. 86; Edelman v. Rams, 58 Misc. Rep. 561, 109 N. Y. Supp. 816.

A transfer of a note, payable to the maker's own order, and not indorsed by him is not a transfer in due course of business and the transferee is not a holder in due course. Nat. City Bank v. Titlow, 233 Fed. Rep. 838, S. C. sec. 187.

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[1] Sec. 184, N. I. L.

While a note payable to the maker's own order is not a good legal contract until indorsed, yet a note in which the payee is one of two or more makers is not invalid. Although for technical reasons the payee can not maintain an action at law on it, there is a remedy in equity. Reid v. Windsor, 111 Va. 825, 69 S. E. 1101.

Defendant indorsed a note, payable to the maker's own order, which the maker subsequently indorsed and negotiated. *Held*, that defendant was liable on his indorsement. Yonker's Nat. Bank v. Mitchell, 156 App. Div. 318, 141 N. Y. Supp. 128.

Sec. 185. Check Defined.

A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Van Buskirk v. State Bank, 35 Col. 142, 83 Pac. 778, 117 Am. St. Rep. 182, S. C. sec. 189; Wedge Mines Co. v. Denver Nat. Bank, 19 Col. App. 182, 73 Pac. 873; Boswell v. Citizen's Sav. Bank, 123 Ky. 485, 96 S. W. 797; Nelson v. Diffenderffer, 178 Mo. App. 48, 163 S. W. 271; State Bank v. Weiss, 46 N. Y. Misc. Rep. 93, 91 N. Y. Supp. 276, S. C. sec. 137; Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187; Riddle v. Bank of Montreal, 145 App. Div. 207, 130 N. Y. Supp. 15; Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, S. C. secs. 132, 137; Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655, S. C. secs. 9-5, 56; B. & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837, S. C. sec. 189; Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, S. C. secs. 71, 72-2.

An instrument not drawn on a bank is not a check, although it may be so styled on its face. Amsinck v. Rogers, 103 App. Div. 428, 93 N. Y. Supp. 87, affirmed 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 12 Am. St. Rep. 858, S. C. secs. 129, 152.

Under the act a cashier's check, whether certified or otherwise, is classed with bills of exchange payable on demand. Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59; *Cf.* Hannon v. Allegheny Bellevue Land Co., *infra*, p. 398.

A certificate of deposit payable to the order of the payee "on the return of this certificate properly indorsed" issued by a bank when indorsed by the payee is in legal effect a check under this section and section 126. State v. Garland, 65 Wash. 666, 118 Pac. 907, 58 L. ed. 772.

FIRST NATIONAL BANK.

Rawlins, Wyo., Jan. 23, 1909.

Pay to the order of Ed. Brown, twenty-five hundred dollars.
For Wilkes.

This check may not be paid unless object for which drawn is stated.

COW CREEK SHEEP COMPANY.

Held, an instrument for the unconditional payment of money. Brown v. Cow Creek Co., 21 Wyo. 1, 126 Pac. 886, S. C. sec. 3-2.

ENGLAND—

The provision that a check is a bill of exchange is declaratory. M'Lean v. Clydesdale Banking Co., 9 App. Cas. 95.

A form of receipt, signed by a retired army officer for the amount of his pension due and having the following note at the foot: "This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination," is not a negotiable instrument. Jones & Co. v. Coventry [1909], 2 K. B. 1029.

An order on a bank to pay "provided the receipt form at foot hereof is duly signed, stamped, and dated," is not an unconditional order to pay and is therefore not a check. Bavins v. London & S. W. Bank [1900], 1 Q. B. 270.

In Capital & Counties Bank v. Gordon [1903], A. C. 240, 252, 88 L. T. R. 574, S. C. sec. 25, also *infra,* pp. 554, 561, it was held that checks drawn payable to X and crossed payable only upon signature by the payees of a form of receipt at the foot of the instrument were not bills of exchange within the meaning of the Bills of Exchange Act. The fact that the checks were payable to X, without words of negotiability, would not under the English Act render them non-negotiable.[1] Therefore the judgment may be regarded as an authority to the effect that the requirement of a receipt by the payees upon the instrument impairs its negotiability.

But a check which bore at the foot the words "The receipt at the back hereof must be signed, which signature will be taken as an indorsement of the check," and on the back of which was a receipt form, is negotiable, since the order to pay is unconditional, the words at the foot not being addressed to the bankers and not affecting the order to them. Nathan v. Ogdens (K. B. Div., Aug., 1905), 21 T. L. R. 775, 93 L. T. Rep. 553 (*semble*).

The defendant gave the plaintiffs a check written on a blank sheet of paper on the face of which he wrote "to be retained." The defendant promised to send a check on one of his banker's printed forms in substitution for this check. The defendant did not do this and the check was dishonored on presentment. In an

[1] *Supra,* p. 353, n. 1.

action on the check. *Held,* that the addition of the words, "to be retained" merely imported a condition between drawer and payee, not addressed to the bankers and not binding on them and that the order as regards the banker was an unconditional order to pay. The said words are only requests to the payee, and the check was an unconditional order to pay within the meaning of section 73 B. E. A. [section 185 N. I. L.] and plaintiffs were entitled to sue upon it, citing Nathan v. Ogden, *supra;* Roberts & Co. v. Marsh [1915], 1 K. B. 42.

This case seems clear: the words "to be retained" can fairly be regarded merely as a request to the payee. But it is submitted that Nathan v. Ogdens is wrong since the words at the foot of the check plainly imply that the drawer did not intend the drawee to pay unless the receipt was signed.

A deposit in the A bank by the drawer of a certified check on the B bank is not the same as a deposit of cash, although the amount is credited to the depositor, and if the B bank fails the depositor can not hold the A bank, no negligence in failing to present the check for payment being shown. Gaden v. Newfoundland Savings Bank [1899], A. C. 281, Privy Council.

Sec. 186. Within What Time a Check Must Be Presented.

A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.[1]

The Illinois Act interpolates "and notice of dishonor given to the drawer as provided for in the case of bills of exchange" after the word "issue" in line two.

The criticisms and comments on this section by Professor Ames, Judge Brewster and Mr. McKeehan will be found under section 89, *supra.*

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[1] "Subject to the provisions of this Act,—(1) Where a check is not presented for payment within a reasonable time of its issue, and the drawer, or the person on whose account it is drawn, had the right at the time of such presentment, as between him and the banker, to have the check paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such check been paid. * * * (3) The holder of such check as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him." B. E. A. s. 74.

It is submitted that this section should be amended as was done in Illinois, the evil effects of sections 89 and 186 having been shown in several cases cited under section 89.[1]

Moskowitz v. Deutsch, 46 Misc. Rep. 603, 92 N. Y. Supp. 721, S. C. sec. 124; Singer Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59.

In an action against the drawer of a check which had not been presented within a reasonable time, the burden is on the defendant to show that he has suffered loss by such failure to present the check. Rosenbaum v. Hazard, 233 Pa. 206, 82 Atl. 62; German-American Bank v. Wright, 85 Wash. 460, 148 Pac. 769, S. C. sec. 56, *semble;* Cox v. Citizens' State Bank, 73 Kan. 789, 85 Pac. 762; *contra,* Dehoust v. Lewis, 128 N. Y. App. Div. 131, 112 N. Y. Supp. 559, *semble.*

In an action against the drawer on the original debt for which a check was given, it was held that the burden is on the defendant to show loss to him resulting from the negligence of the payee in failing to give prompt notice of dishonor of the check. Morris-Miller Co. v. Von Pressentin, 63 Wash. 74, 114 Pac. 912.

Even though it be conceded that it is negligence for the holder of a check to send it directly to the drawee for collection, as to which there is a conflict, this does not discharge the drawer unless he shows that such negligence results in loss or damage to him. *Ib.*

But in Pickett v. Thomas J. Baird Co., 22 N. D. 343, 133 N. W. 1026, it was held that it was negligence to send a check to the drawee for collection, and that the burden was on the transmitting bank to prove that the drawer had not thereby suffered injury, it having been agreed that the drawee bank received deposits and paid checks during the whole of the day it received the check.

Where a check is negotiated at a town distant from the drawee bank, it is not negligence to forward it for collection through the mails, even though it might have been more expeditiously sent by messenger. Nor is it necessarily negligence to send it to the drawee instead of to a third person for presentation, where payment was refused because of lack of funds of the drawer and its dishonor could not have been ascertained sooner if it had been forwarded to a collecting agent. Citizens' Bank v. First Nat. Bank, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, S. C. sec. 71. See also Plover Savings Bank v. Moodie, *supra*, sec. 71, as to forwarding checks where the drawee bank is in another place.

Where plaintiff bank sued the drawer and indorser of a check pledged with it by the indorser it was held that evidence was properly rejected as to whether it was customary or in keeping

[1] See also Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Rev. 599.

with prudent banking to hold a check taken as collateral for twenty days before sending it for collection; the material thing, under section 186, being whether loss was caused by such delay, as to which there was no evidence or offer of evidence. The plaintiff was allowed to recover. German-American Bank v. Wright, 85 Wash. 460, 148 Pac. 769, S. C. sec. 56.

Under section 186, the taker of a stale check, while not an unqualified holder in due course, is such holder except in so far as the drawer of the check can show that he has been injured by the delay. *Ib.*

Where the payee of a check indorsed and deposited it in his own bank, which credited him with the amount as cash to be drawn against, the bank became *prima facie* the owner of the check and not a mere agent to collect, and in order to charge the payee as indorser the bank must present the check to the drawee bank within a reasonable time. Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925, S. C. sec. 109.

The indorser of a check does not waive delay in presentment and renew his obligation by procuring and indorsing a duplicate of a lost check from liability upon which he has been discharged by such delay. *Ib.*

Although under section 185 a check is a bill of exchange payable on demand, it is intended for immediate use and not to circulate as a promissory note. Therefore the transfer of a check to successive holders, where it is drawn and delivered in the place where the drawee bank is located, does not extend the time for presentment. If the check is delivered on one day and is not presented before the close of banking hours the next business day, the drawer is discharged to the extent of any loss suffered from the failure to present. Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 120 Am. St. Rep. 565, S. C. sec. 53; Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747, S. C. secs. 25, 53, 56; Dehoust v. Lewis, 128 App. Div. 131, 112 N. Y. Supp. 559; Sulsberger & Sons Co. v. Cramer, 170 App. Div. 114, 155 N. Y. Supp. 775; Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447, S. C. secs. 23, 71, 89; School District v. Eager, 19 Okla. 235, 91 Pac. 847; Turner v. Kimble, 37 Okla. 92, 130 Pac. 563; Cox v. Citizens' State Bank, 73 Kan. 789, 85 Pac. 762; Aebi v. Bank of Evansville, 124 Wis. 73, 102 N. W. 329.

A check which, if presented during banking hours the next day after its receipt, would have been paid, was not presented until the second day and in the meantime the drawer failed. *Held,* that by the delay the holder made the check his own, and had no greater rights than ordinary creditors. Furber v. Dane, 203 Mass. 108, 89 N. E. 227; Gordon v. Levine, *supra,* was cited but the N. I. L. was not.

The payee of a check delivered on Sunday in payment of a debt can not hold the drawer on non-payment by the bank, although the check was presented within a reasonable time. And even though the check was invalid because delivered on Sunday, the

payee can not recover on the original claim against the drawer if he failed to present the check for payment with due diligence before the drawee bank failed. Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361, S. C. sec. 53.

Although the drawer is discharged only to the extent of loss caused by unreasonable delay in presentment and notice of dishonor, an indorser is wholly discharged by such delay, irrespective of any question of loss or injury. Swift & Co. v. Miller, 62 Ind. App. 312, 113 N. E. 447, S. C. secs. 23, 71, 89, citing cases both before and since the act.

Action on a check given by a firm in which defendant was a partner for money loaned by plaintiff to the firm. The other partner thereafter drew out the firm's deposit and the defendant settled with him without ascertaining whether the check had been paid. *Held*, that section 186 has no application, the efficient cause of the loss to plaintiff not being the delay in presenting the check but the drawing out of the money and subsequent settlement between the partners. Heralds of Liberty v. Hurd, 44 Pa. Super. Ct. 478.

A teller's check is but a substitute for a certified check and much more closely resembles it than it does a bill of exchange strictly speaking. On October 16, at 1:30 P. M., a check drawn on a bank by its teller in the city in which both the defendant and plaintiff were located, was indorsed by plaintiff to defendant. The bank failed at noon October 18, and the check was not presented for payment until October 19. *Held*, that the delay was unreasonable and the indorser was released. The plaintiff argued that since the check was a teller's check he was entitled to treat it as a promissory note under section 130, in which case the delay would not be unreasonable. Hannon v. Allegheny Bellevue Land Co., 44 Pa. Super. Ct. 266; *Cf.*, Singer Mfg. Co. v. Summers, *supra*, p. 393.

In view of the custom of the New York Clearing House Association, the deposit of a check on the morning of the day after its receipt, it having been received after banking hours, and its presentment for payment in the usual course of business by the bank of deposit on the day following shows due diligence in the presentment of the check. Zaloom v. Gamin, 72 Misc. Rep. 36, 129 N. Y. Supp. 85, S. C. sec. 71; Loux v. Fox, 171 Pa. 68, 33 Atl. 190; Willis v. Finley, 173 Pa. 28, 34 Atl. 213, accord; Edminston v. Herpresheimer, 66 Neb. 94, 92 N. W. 138, *contra*. See 20 Banking Law J. 13, rightly approving the Pennsylvania cases as following the custom of merchants.

The Supreme Court of Texas, in which state the N. I. L. has not been adopted, is in accord with the Nebraska court in holding that the time for presentment is not prolonged in places where there is a clearing house when the party affected thereby is not a member of the clearing house, although the collecting and drawee banks are members. Dorchester v. Merchants Bank, 106 Tex. 201, 163 S. W. 5, 50 L. R. A. (N. S.) 542.

In Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 109 N. E. 179, S. C. sec. 119, is a dictum to the effect that the Clearing House Association can not change the rules of the law merchant and that persons not members of the association are not bound by its rules. As to the question when reasonable time is for the court and when for the jury, see section 193 notes.

Sec. 187. Certification of Check—Effect of.

Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.[1]

For comment on this section by Professor Ames, see *supra*, section 62.

See also, 41 Am. Law. Reg. 127, 137 *et seq.*, and Falconbridge Banking & Bills of Exchange, 2d Ed., 764-765.

So far as concerns the liability of the certifying bank, it is immaterial whether the drawer of a check had a deposit in the bank. The N. I. L. was not cited. Security State Bank v. State Bank of Brandtford, 31 N. D. 454, 154 N. W. 282.

But a bank certifying a check without funds is not liable thereon except to a holder in due course. National City Bank v. Titlow, 233 Fed. Rep. 838, S. C. sec. 184.

Defendant bank certified a check at the request of the payee who failed. The drawer stopped payment of the check. In an action on the check by the payee's representative the defendant set up a right of set-off which the drawer had against the payee. *Held*, that by the certification the drawer was discharged, that neither he nor the drawee could thereafter enforce the set-off against liability on the check. Carnegie Trust Co v. First Nat. Bank, 213 N. Y. 301, 107 N. E. 693, L. R. A. 1916C, 186.

Where the drawer of a check before delivery to the payee procures its certification and the bank fails before presentation for payment, the bank is not liable on the check to the drawer, but only to the holder, and therefore the drawer on receiving the check from the payee can not set it off against a debt to the bank. Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442.

Notice to a bank by a depositor that his certified check, indorsed in blank, had been lost and to stop payment, would not justify the bank in refusing payment to a holder in due course. Poess v. Twelfth Ward Bank, 43 Misc. Rep. 45, 86 N. Y. Supp. 857, *semble*, S. C. secs. 16, 51. See also, Unaka Bank v. Butler,

[1] Not in B. E. A.

supra, sec. 56; *cf.,* Elliott v. Worcester Trust Co., *supra,* sec. 87, and Pease & Dwyer v. State Nat. Bank, *infra,* sec. 189.

The payee of a check given to him for value, transferred it, also for value, to plaintiff, but without indorsing it. The payee died the next day, and the drawer, although having no equities against the check, stopped payment. Plaintiff subsequently sent the check to the drawee bank, and the teller certified it without asking any questions. *Held,* that under section 49, N. I. L., the title of the payee vested in plaintiff, and that the bank was liable to him upon its certification. Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. sec. 49.

In Smith v. Field, 19 Idaho, 558, 114 Pac. 668, Ann. Cas. 1912C, 354, it was held that where a bank certified a post-dated check at the request of the drawer, it became immediately liable to the payee upon the delivery of the check to him, and that the check was payable upon presentment at any time during business hours, although the day of its date had not arrived, and although the drawer had no funds in the bank and a statute made it a penal offense to certify a post-dated check, but made it an obligation of the bank to an innocent holder, that a deposit of the check was a substantial compliance with a statute permitting a justice's court to accept a deposit of money in the place of an undertaking required upon an appeal. It is submitted that this holding is contrary to the authorities which hold that a post-dated check is payable on demand on and after the day of its date, not before. Mohawk Bank v. Broderick, 10 Wend. 304, S. C. 13 Wend. 133, and that a bank certifying a post-dated check is not liable thereon, unless it appears that the drawer had funds on deposit at the time of the certification, or that the officer certifying had authority to certify post-dated checks, since there is no authority implied by law for an officer of a bank to certify a check until on or after the day it is made payable, and that one taking a post-dated check before the day of its date is put upon inquiry. Clarke Nat. Bank v. Bank of Albin, 52 Barb. 592.

The practice of certifying checks does not appear to prevail in England. Chalmers, Bills of Exchange, 6th Ed., 249.

Sec. 188. Effect Where the Holder of Check Procures it to Be Certified.

Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.[1]

National Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 513, S. C. sec. 62; Gallo v. Brooklyn Sav.

[1] Not in B. E. A.

Bank, 199 N. Y. 222, 92 N. E. 633, 32 L. R. A. (N. S.) 66; Carnegie Trust Co. v. First Nat. Bank, 213 N. Y. 301, 107 N. E. 693, L. R. A. 1916C, 186, S. C. sec. 187; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. secs. 49, 187; Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187.

But the drawer is not discharged when the check is certified by his procurement. Davenport v. Palmer, 152 App. Div. 761, 137 N. Y. Supp. 796. Even though the drawer has the check certified at the request of the payee. Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850.

The mere acceptance by the payee of a check certified by the procurement of the drawer is not a discharge of the drawer, even though the bank at the time the check was certified transferred the amount to the credit of the payee, such transfer being without the knowledge or acquiescence of the payee. Cullinan v. Union Surety & Guaranty Co., 79 App. Div. 409, 80 N. Y. Supp. 58.

If the drawer gets the check certified and then delivers it, the certification does not discharge the drawer. But if the holder neglects to present the check for payment in due course the drawer is discharged to the extent he suffers by the delay, just as in the case of an uncertified check under section 186. City of Brunswick v. People's Sav. Bank, 194 Mo. App. 360, 190 S. W. 60.

Where the holder procures certification of a check, this is payment to the amount of the check, and where the check contained a statement on the back that it was to be in full payment, such procuring of certification is an acceptance of the check in full payment. St. Regis Paper Co. v. Tonawanda Co., 107 App. Div. 90, 94 N. Y. Supp. 946; Adams v. Weissner, 147 N. Y. Supp. 946, accord as to the first proposition. Not citing the N. I. L.

So, also, where the holder procured certification of a check sent in a letter stating that it was in full payment, although the holder after the certification wrote to the drawer and declined to accept the check in full payment. Dunn v. Whalen, 120 App. Div. 729, 105 N. Y. Supp. 588; Scheffenacker v. Hooper, 113 Md. 111, 77 Atl. 130. The N. I. L. was not cited in these two cases.

When the holder procures certification of a check, which was given for property sold to the drawer, the drawer is discharged and the bank becomes a debtor to the holder and can not avoid payment by showing that the holder obtained the check from the drawer by false representations as to the property. The certification has the same effect as if the holder had drawn the money, re-deposited it and taken a certificate of deposit for it. But *semble* that if the drawer procures the certification, since he is not thereby discharged, either he or the bank can set up the fraud on the drawer. Times Square Automobile Co. v. Rutherford Nat. Bank, 77 N. J. L. 649, 73 Atl. 479. See City of Brunswick v. People's

Sav. Bank, *supra,* this section. See further comment under next case.

B paid A for a horse by a check drawn by B & Co. to B's order and certified by procurement of B, who indorsed the check to A, who deposited it in the X bank, which credited him with the amount. Payment was stopped by B because of fraudulent representations of A which induced the purchase of the horse. There was no showing that B had repudiated the trade and tendered the horse to A. The X bank sued the drawee which interpleaded B but not A. *Held,* that neither the drawer nor the indorser could stop payment of a certified check after it had been delivered, that the X bank was a *bona fide* holder, though not for value, and that the X bank could recover against the drawee. Blake v. Hamilton, etc., Bank (Ohio St.), 87 N. E. 73.

If in this case and in the preceding case of Times Square Automobile Co. v. Rutherford Nat. Bank, the defrauded drawer had rescinded the contract and offered to return the property and the bank had been notified of this fact and instructed not to pay the check, it would have no right to do so. The fraudulent payee became constructive trustee of the check for the drawer, whether the check was certified or not, and payment to a constructive trustee after notice of the trust would be a wrongful payment. When the bank is sued it should interplead both the drawer and the payee or under reformed procedure bring them into the action. In some cases it has been held that the bank could defend in the action at law at the instance and in the interest of the defrauded party. Merchants Exch. Nat. Bank v. New Brunswick Savings Inst., 33 N. J. L. 170. See discussion under section 59 *supra,* pp. 220, 221.

Plaintiff drew a check on the A bank to the order of defendant bank, deposited it in defendant bank and was credited with the amount on the books of the defendant bank. The same day the messenger of defendant bank presented the check for payment to the A bank which declined to pay cash, but offered to certify and did certify the check, making it payable at the B bank. The messenger at once went to the B bank and presented the check for payment, but as it was after banking hours payment was refused. The next day the check was presented to the A bank through the clearing house for payment, but the A bank was closed and the check was returned to defendant bank unpaid. There was a conflict as to whether the check had been deposited in the ordinary way or had been deposited upon the agreement, that defendant bank should take the check for collection as plaintiff's agent. Plaintiff sued defendant bank for the amount of the check. *Held,* that it was a question for the jury how the check was deposited, and that if it had been deposited in the ordinary way and credited to plaintiff on the books of defendant bank, the plaintiff was discharged from liability on the check by the certification and could recover the amount from the defendant. Ingraham, P. J., dissenting, on the ground that the certification was not at the request of or for the benefit of defendant, who was bound only

to exercise due diligence to collect the check, and that the certification was accepted by it only because the drawee bank had refused cash and as a step in the protection of the plaintiff's interests. *Quaere,* also, whether even though under section 188 the drawer could not be sued on the check, this is inconsistent with the right of the bank to charge the amount back, if it had been diligent. It is submitted that the opinion of the dissenting judge is more in accordance with justice as applied to the facts. Lyons v. Union Exch. Nat. Bank, 150 App. Div. 493, 135 N. Y. Supp. 121.

This section applies only to indorsers at the time of certification and can not be deemed to operate as a release of a subsequent indorser. John J. Felin & Co. v. Petrix, 167 N. Y. Supp. 1073.

Sec. 189. When Check Operates as An Assignment.

A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.[1]

Boswell v. Citizens' Savings Bank, 123 Ky. 485, 96 S. W. 797; Lonier v. State Savings Bank, 149 Mich. 483, 112 N. W. 1119; Hanna v. McCrory, 19 N. M. 183, 141 Pac. 996, S. C. secs. 3, 87, 132; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, S. C. secs. 49, 187; Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, S. C. sec. 187; Perry v. Bank of Smithfield, 131 N. C. 117, 42 S. E. 551; First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville, 127 Tenn. 205, 154 S. W. 965, S. C. sec. 136; Raesser v. National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979.

A bank which has certified a check by mistake may correct the same by immediately notifying the holder before the check has passed to a *bona fide* holder. Security Sav. & Trust Co. v. King, 69 Ore. 228, 138 Pac. 465.

Before its payment or certification by the bank the drawer of a check may countermand the order, and payment thereafter to the payee by the bank is wrongful. Pease & Dwyer v. State Nat.

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[1] The English Act makes no such provision as to checks specially, but section 53 (1) provides that "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument." And section 73 provides that "Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a check."

Bank, 114 Tenn. 693, 88 S. W. 172, *cf.*, Unaka Bank v. Butler, *supra*, sec. 56; Poess v. Twelfth Ward Bank, *supra*, sec. 187.

A bank is under no legal obligation to the holder of an unaccepted and uncertified check. Payment is therefore voluntary and can not be recovered back from a *bona fide* holder on the ground that the drawer had previously countermanded payment of the check. National Bank v. Berrall, 70 N. J. Law 757, 58 Atl. 189, 103 Am. St. Rep. 821.

A falsely representing himself to be the agent of B, procured a check to the order of B, got it certified by the drawee bank, subsequently indorsed the name of the payee and negotiated the check to one who collected it from the bank. *Held*, that the certification of a check, made at the instance of the drawer, does not become effective until delivery to the payee, that the payment was wrongful and that the drawer was entitled to recover the amount from the bank. Anglo-South Am. Bank v. National City Bank, 161 App. Div. 268, 146 N. Y. Supp. 457, affirmed without opinion, 217 N. Y. 726, S. C. sec. 23. Of course, the result would have been the same if the check had not been certified, as the bank did not pay according to the order of the payee. See cases under section 23.

A bank being asked to cash a check on another bank, telephoned to the drawee bank and was informed that the check was "good" or "all right," and thereupon cashed the check, but before presentment for payment the drawer notified the drawee bank not to pay the check. *Held*, that the drawee bank was not liable on the check, because it was not accepted or certified in writing. Van Buskirk v. State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182; Ewing v. Citizens' Nat. Bank, 162 Ky. 551, 172 S. W. 955; Ballen v. Bank of Krenlin, 37 Okla. 112, 130 Pac. 539; U. S. Nat. Bank v. First Trust, etc., Bank, 60 Ore. 226, 119 Pac. 343.

The payee of a check deposited it in a bank for collection and it was sent to the clearing house and paid by an adjustment of balances, but according to the rules of the clearing house, it was subsequently returned to the collecting bank because the drawer had made an assignment for the benefit of creditors and the amount was refunded to the drawee bank. *Held*, that the payee can not maintain an action against the drawee bank on the check. Hentz v. National City Bank, 159 App. Div. 743, 144 N. Y. Supp. 979.

The payee of a check indorsed it to a third party, who presented it to a branch of the drawee bank. The check was stamped paid and the amount credited to the account of the indorsee. Later the check was returned to the indorsee on the ground that there were no funds to meet it, and she gave her own check in exchange therefor. The payee took it up and sued the drawee bank. *Held*, that he can not recover, since there was no acceptance or certification by the bank, and if the above transaction constituted a payment the payee was thereby relieved from lia-

bility on the check. Balsam v. Mutual Alliance Trust Co., 74 Misc. Rep. 465, 132 N. Y. Supp. 325.

A drawee bank paid and charged to the account of the drawer checks indorsed by an agent of the payee who had no authority to indorse or collect the checks, and who appropriated the money. *Held*, that the bank was not liable to the payee in assumpsit for money had and received. B. & O. Ry. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837; Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank, 220 Pa. 1, 69 Atl. 280, 15 L. R. A. (N. S.) 519, not citing the N. I. L. Nor in an action on the check. Elyria Sav., etc., Co. v. Walker Bin Co., 92 Ohio St. 406, 111 N. E. 147, L. R. A. 1916D, 433; Clarke & Co. v. Warren Sav. Bank, 31 Pa. Super. Ct. 647, not citing the N. I. L.

It would seem that the plaintiffs in these cases misconceived their remedy and that they should have sued the defendants for conversion of the checks. Ellery v. People's Bank, 114 N. Y. Supp. 108; Bursten v. People's Trust Co., 143 App. Div. 165, 127 N. Y. Supp. 1092; Kansas City, etc., Co. v. Westport Ave. Bank, 191 Mo. App. 287, 177 S. W. 1092; Crisp v. State Bank of Rollo, 32 N. D. 263, 155 N. W. 78; Siegel v. Kovinsky, 93 Misc. Rep. 541, 157 N. Y. Supp. 340.

The checks belonged to the plaintiffs and if, upon demand for their surrender, the bank should refuse to deliver them, they would be entitled to recover against the bank for conversion. And if the bank delivered the checks, the plaintiff could present them to the bank for payment, and if payment was refused, could notify the drawer and recover from him.

In Chamberlain Metal, etc., Co. v. Bank of Pleasanton, 98 Kan. 611, 160 Pac. 1138, S. C. sec. 137, when a bank paid a check on a forged indorsement of the payee's name and charged the drawer's account, the payee was erroneously allowed to recover against the bank on the theory that under section 137 the bank was liable as acceptor of the check, *supra*, p. 369.

The doctrine formerly recognized in Kentucky that a check operates as an assignment, has been abrogated by this section and the bank is not liable to the holder on an uncertified or unaccepted check or in damages for refusal to pay it. First Nat. Bank v. Hargis, etc., Bank, 170 Ky. 690, 186 S. W. 471.

A letter to the drawee bank, "Please protect our checks * * * by the debit of our account," does not constitute an assignment of a part of a deposit in the bank. A check drawn in one bank in favor of another was presented for payment at the clearing house and marked as a credit to the payee bank on the sheet of the drawee, but before the clearing house closed it was returned to the payee with the statement that the drawee had no instructions to pay it. Instead of changing the clearing house entries the payee by its own check repaid the amount to the drawee. *Held*, this did not constitute a payment of the check, nor an acceptance. Eastman Kodak Co. v. Nat. Park Bk., 231 Fed. Rep. 320.

A check is not an assignment of funds of the drawer, nor does the drawee bank become liable in equity to the holder by stating to him that the check is good and will be paid on presentation. Superior Nat. Bank v. National Bank of Commerce, 99 Neb. 833, 157 N. W. 1023; Rambo v. First State Bank, 88 Kan. 257, 128 Pac. 182. Nor is a check an assignment of the drawer's cause of action against the bank for the deposit. Marks v. First Nat. Bank, 84 Ore. 601, 165 Pac. 673.

This section has changed the law in those states in which a check had been held to be an *assignment pro tanto* of the funds of the drawer in the drawee bank. Therefore the administrator of the drawer can recover from the holder the amount of a check collected from the bank after the drawer's death. Cook v. Lewis, 172 Ill. App. 518. But see Glennan v. Rochester Trust, etc., Co., 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. (N. S.) 302, Ann. Cas. 1915A, 441, holding that although a check is not an assignment, the administrator of the drawer can not recover from the drawee bank which, without notice of the death of the drawer, paid the check after the death, and see Elgin v. Gross-Kelly Co., *infra,* this section.

Where a depositor issues a check against his general deposit account, such check is not an equitable assignment of the fund standing to the credit of the depositor, although the depositor made the deposit for the purpose of paying the check, and a garnishment of the bank in a suit against the depositor prior to presentation of the check to the bank, creates a lien on the deposit superior to any rights of the check holder. Kaesemeyer v. Smith, 22 Idaho, 1, 123 Pac. 943, 43 L. R. A. (N. S.) 100 note; Boswell v. Citizens' Savings Bank, 123 Ky. 485, 96 S. W. 797, *semble;* Farrington v. F. E. Fleming, etc., Co., 94 Neb. 108, 142 N. W. 297, 47 L. R. A. (N. S.) 742 is *contra;* but see this case properly criticised in 77 Central L. J. 200, and 27 Harvard Law Rev. 177.

In Gruenther v. Bank of Monroe, 90 Neb. 280, 133 N. W. 402, it was held that where plaintiff accepted a check on the defendant bank on the statement of the bank that the check was good and would be paid, and the drawer thereafter withdrew his deposit, but left with the bank the exact amount of the check, the bank was liable to the plaintiff, the payee, without reference to the provisions of the Negotiable Instruments Law. The remark of one of the three dissenting judges that, "The majority are insensibly controlled by the former decisions of this court with respect to the rights of a check holder," is the only explanation of a decision which is contrary to the plain language of the statute.

In Elgin v. Gross-Kelly Co., 20 N. M. 450, 150 Pac. 922, L. R. A. 1916A, 711, a bank paid a check on it, without notice of the death of one of the partners in the drawer firm. The administrator of the partnership sued the holder for the money. The court held that the payment to the holder was good because the death of the drawer of a check does not revoke the authority of the bank to pay it to a holder for value, at least, if the drawer's estate is solvent, if the bank has no notice of the death. The court might

have left its decision on the authorities cited by the court on this point to which may be added the later case of Glennan v. Rochester, 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. (N. S.) 302, Ann. Cas. 1915A, 441, *supra*, p. 406, and see also, articles in 14 Harvard Law Rev. 588, and 17 Harvard Law Rev. 104. But as plaintiff relied also on section 189, N. I. L., the court considered that section and limited its operation to questions arising between the bank and the holder of the check, that is, that under this section, a check is not of itself an assignment as against the drawee bank, but is an assignment as against the drawer. It is submitted that this distinction is unsound, and like Guenther v. Bank of Monroe, *supra*, another example of the tendency of some courts to take a narrow view of the statute and hark back to the old law of the state.

Before the Negotiable Instruments Law, the question whether a check was an assignment of any part of the drawer's deposit had been considered by the courts, both with respect to the rights of the holder against the drawee and the rights of the holder against the drawer or the latter's creditors or estate, and there had been differences of opinion on both questions. Before the statute, the weight of authority was that a check was not an assignment in either respect. The purpose of the Uniform Negotiable Instruments Law was to abrogate this conflict, and when the statute declares that a check of itself does not operate as an assignment, to say that it does so operate in any case is to declare the exact opposite of the statute.

A depositor in contemplation of suicide drew a check upon the bank payable to the order of his betrothed for an amount a few cents less than his entire account, and killed himself immediately after mailing the check to the payee. *Held,* that the check could not be enforced against the bank or the estate of the drawer. Not being an assignment of any part of his bank account it was not a valid gift *inter vivos*, and being in contemplation of suicide, it was against public policy and not a valid gift *mortis causa*. Love and affection did not constitute a sufficient consideration to support it. Bainbridge v. Hoes, 163 App. Div. 870, 149 N. Y. Supp. 20.

Section 189 does not prevent an assignment by a depositor of his deposit or any part thereof and such assignment need not be made in formal terms. So it has been held that, notwithstanding section 189, an action in equity will lie by the payee of a check to whom an assignment of the fund was also given, and such assignment will be upheld against subsequent claimants. Hove v. Stanhope State Bank, 138 Iowa, 39, 115 N. W. 476.

Where a check was delivered as a gift *causa mortis*, the whole transaction between the parties is admissible with the check to determine whether a valid assignment of the fund was made. First Nat. Bank v. O'Byrne, 177 Ill. App. 473.

So, also, this section does not prevent the drawee bank being liable when the drawer and payee of a check agree upon the appropriation to its payment of certain funds thereafter to be paid into the bank and which were paid in, when the check was at once sent

to the bank and the bank advised of such agreement, but nevertheless allowed said funds to be exhausted in making other payments. People's Nat. Bank v. Swift, 134 Tenn. 175, 183 S. W. 725, S. C. sec. 137.

A check was drawn payable to A, across the face of which the drawer wrote, "To be applied on paper held by L if found correct." *Held,* that these words constituted an express appropriation of the fund to the payment of notes of A held by L, and that in an action against the drawee bank by an indorsee from A of the check, in which a transferee of the notes from L was interpleaded, the indorsee took with notice, from the face of the check, of L's rights, and that L's assignee was entitled to the fund. The N. I. L. was not cited. Slimmer v. State Bank of Halstad, 134 Minn. 349, 159 N. W. 795.

In Ballard v. Bank, 91 Kan. 91, 136 Pac. 935, and in Saylors v. Bank, 99 Kan. 515, 163 Pac. 454, the bank orally agreed to pay checks which might be drawn by a customer to pay for live stock, and the bank was held liable to the payees of such checks, even though the payees were ignorant of the agreement. These cases are not inconsistent with sections 132 and 189, but are applications of the principle of Lawrence v. Fox, 20 N. Y. 268, that a promise made by A to B, to pay C, can be enforced in an action by C directly against A. But an indorsee of the checks should not be able to hold the bank unless he had also an assignment of the cause of action of the payee as beneficiary of the promise of the bank.

TITLE IV.

GENERAL PROVISIONS.

ARTICLE I.

Sec. 190. Short Title.

This act shall be known as the Negotiable Instruments Law.[1]

In Arizona, Connecticut, District of Columbia, Kentucky, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Rhode Island and Wisconsin, this section is omitted either in the original act or in revisions. In some states "may be cited" is used for "shall be known," and in some states "uniform" is inserted before "negotiable."

[1] "This Act may be cited as the Bills of Exchange Act, 1882." B. E. A. s. 1.

Sec. 191. Definitions and Meaning of Term.

In this act, unless the context otherwise requires, –

"Acceptance" means an acceptance completed by delivery or notification.[1]

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.[2]

"Bearer" means the person in possession of a bill or note which is payable to bearer.(*a*)

"Bill" means bill of exchange, and "note" means negotiable promissory note.[3]

"Delivery" means transfer of possession, actual or constructive, from one person to another.(*b*)

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.(*c*)

"Indorsement" means an indorsement completed by delivery.(*d*)

"Instrument" means negotiable instrument.[4]

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.(*e*)

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

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[1] The English Act contains the same provision, but also provides that "where an acceptance is written on a bill and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable." B. E. A. ss. 2, 21 (1). See *supra*, p. 57, n. 1, and p. 359, n. 1.

[2] "'Banker' includes a body of persons, whether incorporated or not, who carry on the business of banking." B. E. A. s. 2.

[3] "'Bill' means bill of exchange and 'note' means promissory note." B. E. A. s. 2.

The same section of the English Act also gives the following additional definition: "'Bankrupt' includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy."

[4] Not in B. E. A.

The definitions in this section do not apply if the context of any particular portion of the law otherwise requires. Smith v. Nelson Land & Cattle Co., 212 Fed. Rep. 56, 128 C. C. A. 512, S. C. secs: 4-2, 25, 58, 184.

(*a*) "Bearer," see Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, *supra,* secs. 31, 49; Ohio Valley Co. v. Great Southern Fire Ins. Co. (Ky.), 197 S. W. 399, S. C. sec. 47. The maker of a note who has obtained possession of it by theft after it has been indorsed in blank by the payee is the bearer within the meaning of the statute. Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959, S. C. secs. 9-5, 16, 56, 124.

(*b*) "Delivery," see Irwin v. Deming, 142 Iowa, 299, 120 N. W. 645, S. C. sec. 30; Gray v. Baron, 13 Arizona, 70, 108 Pac. 229.

Where the parties are at a distance from each other, placing a note in the mail addressed to the payee, constitutes a delivery of the note. Trego v. Cunningham's Estate, 267 Ill. 367, 108 N. E. 350, S. C. sec. 68.

(*c*) "Holder," see Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, *supra,* secs. 31, 49; Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817, *supra,* sec. 66; New Haven Mfg. Co. v. New Haven Pulp Co., 76 Conn. 126, 55 Atl. 604, *supra,* sec. 48; Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, *supra,* sec. 14; R. M. Owen & Co. v. Storms & Co., 78 N. J. L. 154, 72 Atl. 441, *supra,* sec. 51; Craig v. Palo Alto Stock Farm, 16 Idaho, 701, 102 Pac. 393, *supra,* sec. 51; Wilbour v. Hawkins, 38 R. I. 116, 94 Atl. 856, S. C. secs. 25, 29. Cases cited under sections 26 and 52 should also be consulted.

A note contained a recital of the deposit of collateral security "for payment of this or any other liability or liabilities of ———, to the holder hereof, now due or to become due, or that may be hereafter contracted." *Held,* that the blank could be filled in with the name of the maker, such being the intention of the parties, and that an indorsee of the note from the payee for value and before maturity might apply the collateral, not only to the payment of the note, but also to the payment of other obligations owing by the maker to him. Oleon v. Rosenbloom, 247 Pa. 250, 93 Atl. 473, Ann. Cas. 1916B, 233, L. R. A. 1915F, 968.

(*d*) "Indorsement," see Louisville Co. v. International Trust Co., 18 Colo. App. 345, 71 Pac. 898, S. C. *supra*, sec. 30.

The possessor of an unindorsed bill payable to order, who is not the payee, is neither a "holder" nor a "bearer." Day v. Longhurst, W. N. [1893] 3; *cf.*, Walters v. Neary, 21 T. L. R. 146, S. C. sec. 49.

(*e*) "Issue," see Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756, *supra*, sec. 13.

Sec. 192. Person Primarily Liable on Instrument.

The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.[1]

The Kansas Act omits the last sentence.

In addition to the cases hereunder cited, sections 119 and 120 should be consulted for other cases applying this section.

Building & Engineering Co. v. Northern Bank, 206 N. Y. 400, 99 N. E. 1044, S. C. sec. 119; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, S. C. sec. 89; Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847, S. C. sec. 64-1.

Under this section both principal and surety (co-maker) are primarily liable on the note. Roberson-Ruffin Co. v. Spain (N. C.), 91 S. E. 361, S. C. sec. 120.

And the rule is the same, although the note recites that one of the two makers was a principal and the other a surety. *In re* Nashville Laundry Co., 240 Fed. Rep. 795.

An accommodation maker is a person primarily liable, even though he add the word "surety" to his signature, or the fact that he signed for accommodation is otherwise known to the holder. See cases under section 119.

The indorser of a promissory note is not primarily liable thereon, because of the fact that he was at one time the maker of a note which was paid by the substitution of the note in question, on which he was only indorser. Devoy & Kuhn Coal Co. v. Huttig, 174 Iowa, 357, 156 N. W. 413, S. C. secs. 14, 125.

[1] Not in B. E. A.

Under this section an accommodation guarantor signing on the back of a note is only secondarily liable in the absence of a special contract. Noble v. Beeman-Spaulding Co., 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162, S. C. secs. 29, 63, 68, 121.

Although an indorser may be only an indorser or surety, as to the maker, entitled to reimbursement from the maker if the indorser pays the note, yet as to the payee he is primarily liable if the note, on its face, recites that the signers, indorsers, guarantors and sureties are liable *in solido*. Bonart v. Rabito, 141 La. 970, 76 So. 166, S. C. secs. 63, 184.

Sec. 193. Reasonable Time—What Constitutes.

In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.[1]

The South Dakota Act makes an additional provision as follows:

"Section 192. A. The apparent maturity of a bill of exchange, payable at sight, or on demand, is:

1. If it bears interest, one year after its date; or,

2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

Section 192. B. The apparent maturity of a promissory note, payable at sight, or on demand, is:

1. If it bears interest, one year after its date; or,

2. If it does not bear interest, six months after its date."

Citizens' Bank v. First Nat. Bank, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, S. C. secs. 71, 186; *In re* Estate of Philpott, 169 Iowa, 555, 151 N. W. 825, S. C. secs. 14, 52, 53; Gordon v. Levine, 194 Mass. 418, 80 N. E. 505, 120 Am. St. Rep. 565, S. C. sec. 186; Van Buren v. Wensley, 102 Misc. Rep. 248, 169 N. Y. Supp. 789; Singer Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522, S. C. secs. 53, 59, 185; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373, S. C. secs. 53, 64-1. Cases under section 71 should also be consulted.

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[1] The provision here stated generally is made in the English Act as to bills in sections 40 (3) and 45 (2), as to checks in sections 73 and 74 (2), and as to promissory notes in sections 86 (2) and 89 (1).

Where the facts are in dispute "reasonable time" is a question for the jury, otherwise for the court. Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20; First Nat Bank v. Korn (Mo. App.), 179 S. W. 721, S. C. secs. 63, 155; Zaloom v. Ganin, 72 Misc. Rep. 36, 129 N. Y. Supp. 85; Commercial Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020, S. C. sec. 71.

But in Citizens' Bank v. First Nat. Bank, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, S. C. sec. 186, it was said that it is not universally true that even where the facts shown in evidence are without dispute, the question whether presentment was in reasonable time is for the court.

In the absence of any evidence to bring the case within this section, a demand on a promissory note payable on demand must be made within sixty days to charge an indorser, that having been the law in this state prior to the Negotiable Instruments Law. Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987, S. C. sec. 71; Plymouth County Trust Co. v. Scanlon, 227 Mass. 71, 116 N. E. 468.

In Kentucky, demand must be made within four months, it being a matter of common knowledge that banks in central Kentucky rarely permit commercial paper to run more than four months without renewal, so that there is a custom or usage of trade that such paper is ordinarily payable within that time. Frazee v. Phoenix Nat. Bank, 161 Ky. 175, 170 S. W. 532, S. C. sec. 89.

A demand note was indorsed to plaintiff three months and six days after its date. *Held,* the negotiation was within a reasonable time, no special circumstances being shown to the contrary. Weber v. Hirsch, 163 N. Y. Supp. 1086.

A demand note was given by a friendly arrangement between the parties, with the understanding that the payee should ask payment when he needed it. It was presented for payment, dishonored, and notice given to an accommodation indorser about seven months after its date. *Held,* error to dismiss the complaint as against the indorser, on the ground that the demand was not made within a reasonable time. Becker v. Horowitz, 114 N. Y. Supp. 161.

Plaintiff and defendants were directors and stockholders in a corporation which needed money. Plaintiff agreed to lend the money on a demand note made by the company to his order and indorsed by defendants. *Held,* that a delay of two years in presenting the note for payment was not, as a matter of law, an unreasonable delay; that the question was for the jury and that the jury having found for plaintiff, and judgment rendered thereon, the judgment should be affirmed. Hussey v. Sutton, 96 Misc. Rep. 552, 160 N. Y. Supp. 934.

A year after the date of a demand note is an unreasonable time. The N. I. L. was not cited. Greer v. Downing, 176 Ill. App. 355.

ENGLAND—

"Reasonable time," under this section, is a question of fact for the jury. Wheeler v. Young, 13 T. L. R. 468.

On Friday, March 26th, the plaintiff received in London, from the defendant, a check on the Weymouth Old Bank. Plaintiff resided at Streatham and kept an account at the Streatham branch of the London & Southwestern Bank. On Saturday at 2:30 P. M., he posted the check in London to the Streatham branch. The check was received at the Streatham branch on Monday and posted to the head office in London where it was received on Tuesday. It was presented for payment on Wednesday, but on that day the bank stopped payment and the check was dishonored Plaintiff sued the drawer on the check. Defendant contended that what was a reasonable time was a question of law. The judge left the case to the jury, directing them that if they found if the check was presented within a reasonable time, their verdict should be for the plaintiff, otherwise for the defendant. The jury found for the defendant. Wheeler v. Young (Q. B. Div.), 13 T. L. R. 468.

Sec. 194. Time—How Computed—When Last Day Falls on Holiday.

Where the day, or the last day, for doing any act herein required or permitted to be done, falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.[1]

In North Carolina the Revisal of 1908 omits this section from the act, but it is to be found as section 2839 in the chapter entitled, "Sunday and Holidays."

The statutory construction laws of the respective states should be consulted in connection with this and similar sections; *e. g.*, see Consolidated Laws of New York, 1909, secs. 20, 24, 25.

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[1] Not in B. E. A. See B. E. A. s. 14, *supra*, p. 276, n. 1, and B. E. A. s. 92, which reads "Where by this Act the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. 'Non-business days' for the purposes of this Act mean—(a) Sunday, Good Friday, Christmas Day; (b) A bank holiday under the Bank Holidays Act, 1871, or acts amending it; (c) A day appointed by Royal proclamation as a public fast or thanksgiving day. Any other day is a business day." For the Bank Holidays Act see Chalmers, Bills of Exchange, 6th ed., 347-351.

Sec. 195. Application of Act.

The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.[1]

The Arizona Act omits this section.

South Dakota adds at the end of the act the following: "Nothing in this act contained shall be construed in any manner repealing chapters 128, 140 and 141 of the Laws of 1905 and chapter 74 of the Laws of 1907." These chapters refer to notes given for insurance premiums or assessments, for lightning rods, patent rights and the like, for medical services or as to what shall be considered due diligence in the collection of a check or draft.

As the act was originally adopted in Florida, Laws 1897, chapter 4524, this section was included, but in the General Statutes of 1906 and in the Compiled Laws of 1914, it was omitted.

In Minnesota the following words were added to the end of the section: "Nor shall they be construed as modifying, repealing or superseding any of the terms and provisions of section 2747, Revised Laws 1905 (section 6015, General Statutes 1913)." This section relates to instruments or signatures obtained by fraudulent representation, trick or artifice as to the nature and terms of the contract.

The N. I. L. does not appiy to actions on instruments made and delivered before the statute became effective. Dorsey v. Wellman, 85 Neb. 262, 122 N. W. 989; Fassler v. Streit, 92 Neb. 786, 139 N. W. 628; Cox v. Kirkwood (Okla.), 158 Pac. 930; Voris v. Birdsall (Okla.), 153 Pac. 673.

The act does not apply to an indorsement on a note executed before the act went into effect, although the indorsement was made after the act took effect. Gate City Nat. Bank v. Schmidt, 168 Mo. App. 153, 152 S. W. 101; McIntosh v. Gibbs, 81 N. J. Law, 37, 80 Atl. 554, Ann. Cas. 1912D, 163.

The meaning of this section is that the act was not intended to make any instrument negotiable which was not negotiable prior thereto and the legislature had no power to do so because of article 1, section 10 of the Constitution of the United States, forbidding the passage of laws which impair the obligation of a contract. Adams v. Thurmond (Okla.), 149 Pac. 1141.

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[1] Not in B. E. A., but the general rule of law is that a statute is not to be construed as retrospective unless so made in express terms. Chalmers, Bills of Exchange, 6th ed., 2.

Sec. 196. Cases Not Provided for in Act.

In any case not provided for in this act the rules of the law merchant shall govern.[1]

The Kentucky Act omits this section.

Oakdale Mfg. Co. v. Clarke, 29 R. I. 192, 69 Atl. 681, S. C. sec. 47.

In a number of states this section reads: "The rules of law and equity including the law merchant." It is submitted that this form is to be preferred to the original section, for the law merchant is not today a separate branch of the law, but is merely a convenient term for describing the origin of that part of the law which in large part grew up from recognition by the courts of the usages and customs of merchants. For history of the law merchant, see Ewart on Estoppel, 370 *et seq.* Burdick, What is the Law Merchant, 2 Col. Law Rev. 470.

Where the negotiable instruments law is silent, resort must be had to the law merchant or the common law regulating negotiable paper. Mechanics' & Farmers' Savings Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439, S. C. secs. 63, 109.

ENGLAND—

Under this clause a foreign drawer has still a right to re-exchange against an English acceptor, notwithstanding the provisions of section 57, B. E. A.[2] *In re* Gillespie, 16 Q. B. D. 702, affirmed 18 Q. B. D. 286.

Sec. 197. Repeals.

Of the laws enumerated in the schedules hereto annexed, that portion specified in the last column is repealed.

The form of this section differs in the various states.

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1 "The rules of common law, including the law merchant, save so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes and checks." B. E. A. s. 97 (2).

2 *Infra*, p. 553.

Sec. 198. Time When Act Takes Effect.

This chapter shall take effect on

New York, by amendment, adds the following section, numbered 328 (Laws, 1904, ch. 287): "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised."

This additional section is a general statute which promulgates a rule of substantive law and can be relied on as a defense, although not pleaded. Shattuck v. Guardian Trust Co., 204 N. Y. 200, 97 N. E. 517.

Similar provisions have been adopted in some other states, but not as amendments to the Negotiable Instruments Law.

A number of the states add sections defining public holidays and making provisions as to notes given for a patent right.

COMMENTS AND CRITICISMS UPON THE NEGOTIABLE INSTRUMENTS LAW.[1]

THE NEGOTIABLE INSTRUMENTS LAW.[2]

BY JAMES BARR AMES.

However much lawyers may differ as to the expediency of the attempt to secure by codification uniformity in American commercial law, all will agree that the commissioners for promoting uniformity of legislation in the United States could not have selected a better subject for the beginning of the experiment than that of negotiable paper. Even the opponents of codification must admit that the Negotiable Instruments Law, framed and recommended by the commissioners in 1896, and already enacted in fifteen states,[3] contains a number of desirable changes in the law of Bills and Notes, and will, when generally adopted, settle definitively several questions which have given rise to much litigation and conflict of decisions. On the other hand, the friends of codification who chance to read the following pages may become convinced that there are serious defects of commission and omission in the new code. Codification is with us a new art, and it is not surprising, although it is unfortunate, that the commissioners did not realize, as continental codifiers realize, the extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism, especially of public criticism, from practising lawyers and judges, professors and writers, merchants and bankers. It is far from an agreeable task to offer criticisms at this late hour.[4] Nor would the following criticisms be offered now but for the writer's conviction that

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[1] The following articles are reprinted from 14 Harvard Law Review 241; 10 Yale Law Journal 84; 14 Harvard Law Review 442; 15 Harvard Law Review 26; 16 Harvard Law Review 255, and 41 American Law Register, N. S. 437, 499, 561.

[2] Reprinted from 14 Harvard Law Review 241.

[3] Colorado, Connecticut, Florida, Maryland, Massachusetts, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin, and also the District of Columbia.

[4] The writer, although interested in the subject of Bills and Notes both as an author and as a teacher, saw the Negotiable Instruments Law for the first time after its enactment by four state legislatures.

the Negotiable Instruments Law ought not to be enacted by any state which has not yet acted in the matter, unless changed in important respects, and that those states in which it has been adopted should remedy its defects by supplemental legislation.[1] The plan of making the law of Bills and Notes uniform throughout the United States has found favor in so many states that the enterprise ought to be carried through on the basis of the commissioners' proposed code. But in the interest of future codification, as well as for the sake of the law itself, this new legislation should be in such form as to stand the fire of adverse, if also fair-minded, critics.

Before considering the defects in the new code attention should be called to its merits. These are of two kinds: first, salutary changes in the law; and, secondly, the settlement of controverted questions.

Under the new law a negotiable instrument may be made payable to one or more of several payees,[2] or to the holder of an office for the time being.[3] These provisions give effect to the tenor of the instrument and nullify certain unfortunate decisions to the contrary in which the judges failed to grasp the mercantile conception of such instruments.[4] Another judicial error is corrected by the provision that an instrument, though indorsed in blank, ceases to be negotiable by delivery whenever the last indorsement thereon is a special indorsement.[5] Section 166 enacts that the maturity of an acceptance for honor of a bill payable after sight shall be calculated from the date of the noting for non-acceptance, and not, as was erroneously decided in Williams *v.* Germaine,[7] from the date of the acceptance for honor. Since an acceptor, by section 62, engages to pay the bill "according to the tenor of his acceptance," he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered

[1] For several of the criticisms here suggested the writer gratefully acknowledges his indebtedness to his colleagues, Professor Williston and Professor Brannan, who successively have had charge of the subject of Bills and Notes in the Harvard Law School during the last ten years, and he takes satisfaction in adding that these experts in the law of Negotiable Paper concur with the views expressed in this paper.

[2] N. I. L. sec. 8–5. The references follow the numbering of the commissioners' draft.

[3] N. I. L. sec. 8–6.

[4] Blanckenhagen *v.* Blundell, 2 B. & Al. 417; Cowie *v.* Stirling, 6 E. & B. 333

[5] N. I. L. sec. 9–5, nullifying the doctrine first advanced by Lord Kenyon in Smith *v.* Clarke, Peake, 225; 1 Esp. 180, s. c. The language of sec. 9–5 is not happily chosen for the reasons pointed out, *infra*, p. 423.

[6] 7 B. & C. 468.

by the drawer. A bank certifying a raised check is in the same case, since section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European states.[1]

Other judicious changes for the better, but not involving the correction of judicial mistakes, are the following: The abolition of days of grace;[2] the assimilation of sight and demand paper;[3] the provisions that the negotiability of the instrument shall not be affected by its bearing a seal;[4] that a payor may disregard a condition in an indorsement;[5] and that the holder in due course may enforce payment of an altered instrument according to its original tenor.[6]

Especially to be commended are those sections of the new code which settle, and in the right way, certain questions which have been a prolific source of litigation and antagonistic decisions. Nothing but good can come from enacting that the negotiability of an instrument is not destroyed by a clause providing for the payment of exchange,[7] or the costs of collection, or an attorney's fee in case of default,[8] or by a clause giving a power to confess judgment.[9] The same is true of the provisions that an antecedent debt constitutes value;[10] that the holder in due course, although he paid less, may enforce payment of the face value from all parties to the instrument;[11] and that a check is not an assignment of the drawer's claim upon the bank.[12] The rules regulating the liability of the anomalous indorser[13] are admirable, but for one slight omission which may be easily remedied, as will be shown on a subsequent page.[14] The doctrine of section 16, that one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from some one else after his death, is somewhat startling

[1] 4 Harvard Law Review 306, 307.
[2] N. I. L. sec. 85.
[3] N. I. L. sec. 7–1.
[4] N. I. L sec. 6–4.
[5] N. I. L. sec. 39.
[6] N. I. L. sec. 124.
[7] N. I. L sec. 2–4.
[8] N. I. L. sec. 2–5
[9] N. I. L. sec. 5–2.
[10] N. I. L. sec. 25.
[11] N. I. L. sec. 57
[12] N. I. L. sec. 189.
[13] N. I. L. sec. 64.
[14] *Infra*, p 427.

at first. But it should commend itself on reflection. It has been adopted, after much consideration, in Germany.

The new code, it is believed, would have gained greatly in simplicity, arrangement, and expression, if its framers had grasped firmly the principle that the formal right of a claimant upon a bill or note depends solely upon whether he is the holder by the tenor of the instrument, and had also given due emphasis to the distinction between real and personal or equitable defences. It is, however, too late to recast the code. The critic must content himself with pointing out formal or substantial defects in particular sections.

If it be said that it is not worth while to make merely formal changes in sections that have been already enacted in sixteen jurisdictions, it may be answered that clearness, conciseness, and the right way of putting things are intrinsically desirable, and that improvements of this kind do not involve any sacrifice, as to the substantive law, of the principle of uniformity.

It is from this point of view that the following suggestions are made as to matters of form.

Section 3–2 provides that an order or promise is not rendered conditional by the addition of "A statement of the transaction which gives rise to the instrument." What do these words mean? Do they cover the case of a note coupled with the words, "Given as collateral security for A's debt to the payee"? Such an interpretation, although a literal one, would be deplorable, and would nullify several decisions.[1] Mr. Crawford, the draftsman of the code, suggests that this sub-section applies to the case of notes containing a statement that it is given for a chattel which is to be the property of the owner of the note until the note is paid.[2] Such a note is deemed negotiable in several states,[3] and justly, being in effect nothing more than a note secured by a chattel mortgage. But it is highly improbable that the courts of Massachusetts, Kansas, and Minnesota, which have taken the opposite view,[4] will treat this sub-section as changing the law of those

[1] Robbins *v.* May, 11 A. & E. 213; Haskell *v.* Lambert, 16 Gray, 592; Costelo *v.* Crowell, 127 Mass. 293; 134 Mass. 280, 285; American Bank *v.* Sprague, 14 R. I. 410; Hall *v.* Merrick, 40 Up. Can. Q. B. 566.

[2] Crawford, An. N. I. L. 12.

[3] Chicago Co. *v.* Merch. Bank, 136 U. S. 268; Howard *v.* Simpkins, 69 Ga. 773; Choate *v.* Stevens, 116 Mich. 28; Heard *v.* Dubuque Bank, 8 Neb. 10; Mott *v.* Havana Bank, 22 Hun, 354; Kimball *v.* Mellon, 80 Wis. 133.

[4] Sloan *v.* McCarty, 134 Mass. 245; South Bend Co. *v.* Paddock, 37 Kan. 512; Deering *v.* Thorn, 29 Minn. 120.

states. One New York judge has already ruled that the Negotiable Instruments Law has no application to such a note.[1] Many cases have decided that the statement of a consideration in a note is not notice to a transferee of its failure.[2] But the doctrine of these cases, which are doubtless the only ones which this sub-section can fairly be made to cover, is a rule as to *bona fides*, and has nothing to do with conditions. The sub-section in question should be stricken from the act. If interpreted literally, it is mischievous. If not taken literally, it is obscure, inartistic, and useless.

Section 36–2 and 3. An indorsement is restrictive which either (1) "constitutes the indorsee the agent of the indorser, or (2) vests the title in the indorsee in trust for or to the use of some other person." Since the so-called "agent of the indorser" has, under section 37, the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent. The sub-sections 2 and 3 should therefore be consolidated as follows: "An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person."

Section 137 is to the effect that a drawee who destroys a bill delivered to him for acceptance, or refuses to return it within the usual time, shall be deemed to have accepted it. A refusal to accept is an acceptance! Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and against the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill.[3] The section should be cancelled as worse than useless.

The following sections of the code seem to the writer to be defective, not merely in point of form, but in substance.

Section 9–3 declares an instrument to be payable to bearer, although it is "payable to the order of a fictitious or non-existing person." Such a rule ignores the tenor of the instrument; nor is

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[1] Third Bank *v.* Spring, 28 N. Y. Misc. Rep. 9.

[2] 1 Ames, Cases on Bills and Notes, 775, n. 1.

[3] Under the New York statute, 2 Rev. Stat. (6th ed.) 1161, from which section 137 is copied, the holder, to recover, must prove a conversion of the bill. Matteson *v.* Moulton, 79 N. Y. 627.

there any judicial precedent or mercantile custom in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation. By the combined effect of this section and section 16, if a note payable to a fictitious payee were stolen from the maker, and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker. The section should be materially changed. The real and commendable object of the section would be attained, without resorting to a fiction, by a provision as follows: "If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or nonexistent, or of a living person not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and indorsed by, the drawer or maker respectively."

Section 9–(5) provides that an instrument is payable to bearer "(1) where it is expressed to be so payable" and "(5) where the only or last indorsement is an indorsement in blank." The language of this sub-section (5), which is borrowed from section 8–(3) of the English act, is not well chosen. If it is to be taken as it stands, a note payable by A to the order of B and bearing the anomalous blank indorsement of C would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank. This objection apart, the sub-section means that, if an instrument is expressly payable to bearer, it continues to be so payable, although it afterwards be indorsed specially; but that, if an instrument payable to the order of a particular person has become payable to bearer by being indorsed in blank, it ceases to be payable to bearer, if afterwards indorsed specially. This distinction between instruments originally payable to bearer and instruments made so payable by indorsement in blank is illogical and undesirable, and probably was not contemplated by the framers of the English and American acts. There is still a third objection to this subsection. If an instrument indorsed in blank and subsequently

indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this sub-section, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name. The following substitute is suggested for section 9–(1) and 9–(5): "The instrument is payable to bearer

"(1) when it is expressed to be so payable;

"(5) when, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee.

"An instrument payable to bearer will, however, whenever it is indorsed specially, carry notice that the property in it was at one time vested in the special indorsee, so that, in the absence of an indorsement or assignment by him, all subsequent holders will hold for the benefit of such indorsee."

SECTION 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument, if not duly authorized.[1] This is a departure from the English act and from the almost uniform current of judicial decisions.[2] This new rule involves a flat contradiction of the instrument, and the fiction works not justice but injustice. For example: A, mistakenly believing that he is duly authorized, signs a note, "A, agent for B," and delivers it to C, the payee. At maturity B repudiates the note. He is, however, at that time a bankrupt. A is rightfully chargeable to C on his implied warranty of authority, but only to the amount that C might have recovered from B, if he had authorized the note. But, under section 20, A is liable to C for the face of the note.

By SECTION 22 the indorsement or assignment of the instrument by an infant "passes the property therein." Does this section, like the corresponding section of the English act, mean merely that the indorsee has the right to enforce payment from all

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[1] Mr. Crawford so interprets the section. Crawford, An. N. I. L. 26.

[2] Hall *v.* Crandall, 29 Cal. 567; Noyes *v.* Loring, 55 Me. 408; Bartlett *v.* Tucker, 104 Mass. 336; White *v.* Madison, 26 N. Y. 117; Miller *v.* Reynolds, 92 Hun, 400. The case of Byars *v.* Doores, 20 Mo. 284, is *contra*.

parties prior to the infant, or does it mean that the indorsee becomes absolute owner of the instrument, so that he and his transferees, whether with or without notice of the infancy, may retain the instrument even against the infant? If it was intended to reproduce the effect of the English act on this point, it is unfortunate that the unambiguous language of that act was not retained. If, on the other hand, it was intended to make the infant's transfer of negotiable paper irrevocable, the section introduces a radical change in the law as to the rights of infants, and one that goes unnecessarily far in protecting an indorsee who knows that he is dealing with an infant.

Section 29 defines an accommodation party as one who has signed the instrument "without receiving value therefor and for the purpose of lending his name to some other person." By this definition one who has received a commission, which is certainly value, for lending the credit of his name would not be an accommodation party. But no business man or good lawyer would sanction such a distinction. The words, "without receiving value therefor and," should be cancelled as inaccurate and misleading.

Section 34 distinguishes between special and blank indorsements, but it is nowhere stated that an indorsement, like the drawing of a bill, is an order. If the payee writes, "I assign this note to B," or "I guarantee to B the payment of this note," is he liable as indorser on his assignment or guaranty? Is his transferee an indorsee, and therefore within the rule that gives a holder in due course the title free from equitable defences? There are numerous but discordant decisions on these points, and it is unfortunate that the new code does not secure uniformity here, as it does in the matter of notes payable with exchange or attorneys' fees.

Section 37 confers upon the indorsee under a restrictive indorsement the right to bring any action that the indorser can bring. Inferentially such an indorsee cannot sue his indorser. This is just, if the instrument was transferred to the indorsee for the benefit of the indorser. But unjust, if the indorsement was for value to the indorsee in trust for a third person.

Section 40, which has no counterpart in the English act, provides that an instrument indorsed in blank, although subsequently indorsed specially, "may nevertheless be further negotiated by delivery," the special indorser being liable of course "to only such holders as make title through his indorsement." If, for example,

the special indorsee lost possession of the instrument by accident or theft, and the finder or thief transferred it by delivery to one who had no notice of the loss or theft, the latter is entitled to charge all parties antecedent to the special indorser. Lord Kenyon ruled to this effect in Smith *v.* Clarke,[1] and his view was followed by the courts,[2] and was repeated in the text-books, in a form much resembling the language of the section under discussion.[3] But Lord Kenyon failed to see that the special indorsement was notice that the instrument had become the property of the special indorsee, and that the right of any subsequent taker must be derived through him. To correct Lord Kenyon's error, and, as Mr. Chalmers tells us,[4] "to bring the law into accordance with mercantile understanding," section 8–3 was inserted in the English act, which defined an instrument payable to bearer as one "which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." This section of the English act is reproduced in section 9–5 of the American act, so as to change the law in this country also. Then, in apparent forgetfulness of the effect of section 9–5, the framers of the American act insert section 40, which changes the law back to its former state. One of these repugnant sections, and preferably section 40, should be cancelled.[5]

Section 49 gives to the transferee of an instrument payable to the order of the transferor, but not indorsed by the latter, "such title as the transferor had therein," and also "the right to have the indorsement of the transferor." If an indorsement was intended, but omitted through inadvertence, it is obviously just that the transferor should be required to indorse subsequently. If, on the other hand, the omission is not due to inadvertence, it is as obviously unjust, as Mr. Bigelow has pointed out,[6] to compel the transferor to assume the liability of an indorser. In section 44 it is provided that any person under obligation to indorse

[1] Peake, 225; 1 Esp. 180, s. c.

[2] Walker *v.* MacDonald, 2 Ex. 527; Savannah Bank *v.* Haskins, 101 Mass. 370; Houry *v.* Eppinger, 34 Mich. 29; Watervliet Bank *v.* White, 1 Den. 608; French *v.* Barney, 1 Ired. 219; Mitchell *v.* Fuller, 15 Pa. 268.

[3] Byles, Bills (13th ed. 1879), 152; Chitty, Bills (11th ed. 1878), 173; Chalmers, Dig. of Bills of Exch. (1878) 96

[4] Chalmers, Bills of Exch. (5th ed.) 24. See, also, Byles, Bills (16th ed. 1899).

[5] The neutralizing effect of section 40 upon section 9–5 is recognized by the learned writer in 17 Banking Law Journal, 775, who adds: "More wrong than right, it seems to us, will follow the operation of the law as it now stands."

[6] Bigelow, Bills and Notes (2d ed.), 295, n 1.

in a representative capacity may indorse in such terms as to negative personal liability. But there is no similar provision for a qualified indorsement in section 49. Such a provision should be added to this section.[1]

There is a further objection to this section. If the transferee by delivery merely of an instrument payable to the order of the transferor always acquires only the rights of the latter, such a transferee of a note made for the accommodation of the payee could not enforce it against the maker, even though he might have given to the payee the money which it was the object of the maker to procure for the payee on the credit of his own name. Such a result would be a reproach to the law, even if due to the action of the courts. But this section, so far from codifying, actually nullifies the judicial precedents in this country.[2] This defect in this section would be cured by inserting after the word "addition" the words "the right to enforce the instrument against one who signed for the accommodation of his transferor and."

SECTION 64, defining the liability of the anomalous indorser, is an excellent piece of codification but for one slip. One not otherwise a party to a bill payable to the order of the drawer may sign it for the accommodation of the acceptor, as in Matthews *v.* Bloxsome.[3] He should clearly be liable to the drawer-payee. But by the sub-section 2 he is liable only to parties subsequent to the drawer. This case may be provided for by making the first two sections read as follows: —

(1) "If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties."

(2) "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

SECTION 65 introduces the distinction that the implied warranty of genuineness, title, and the like of the transferor by delivery

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[1] The Colorado legislature, to remedy this injustice, before enacting this section, added to the sentence requiring an indorsement the words "if omitted by accident or mistake."

[2] Hughes *v.* Nelson, 29 N. J. Eq. 547; Matthias *v.* Kirsch, 87 Me. 523; Meggett *v.* Baum, 57 Miss. 22; Freund *v.* Importers' Bank, 76 N. Y. 352. See, further, the Scotch case of Hood *v.* Stuart (Court of Sess., March 20, 1870) and the analogous case of an accommodation bond, Dickson *v.* Swansea, L. R. 4 Q. B. 44, which greatly lessens the authority of Edge *v.* Bumford, 31 L. J. Ch. 805.

[3] 33 L. J. Q. B. Young *v.* Glover, 3 Jur. N. S. 637, is a similar case.

inures to the benefit of his immediate transferee, whereas the similar warranty of the indorser without recourse runs in favor of all subsequent holders. This idea that the indorser without recourse is liable to any one but his transferee is an original invention of the Negotiable Instruments Law. But this is its only merit. To say that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee, but to no subsequent purchaser, for the genuineness and title of the thing sold. His liability is therefore identical with that of the transferor by delivery. This view is brought out in almost all of the sixteen reported cases seen by the writer, in which an indorser without recourse was made a defendant. There seems to be no trace of authority for an action against such an indorser by any one but his immediate transferee. In one case[1] a subsequent holder attempted to charge the indorser without recourse, but the court decided against him, Mr. Justice Dillon delivering a convincing opinion, in which the indorsement without recourse was treated as creating the same liability as a transfer by delivery. Section 65 should be amended by adding in the first sentence after "warrants" the words, "as a vendor, and, therefore, only to the vendee," and by cancelling the sentence beginning with the words, "But, when the negotiation."

Section 66 betrays the same misconception in regard to warranty as the preceding section. One who indorses without qualification is liable as indorser to all subsequent holders. If he transfers the bill for value, he incurs the additional but extrinsic liability of a vendor. But this liability runs only to his indorsee as a vendee. These liabilities are quite distinct. As indorser, he cannot be charged until the maturity of the bill and after due diligence exercised by the holder. As warrantor, since the warranty is broken at the moment of transfer, if at all, he may be sued at once, before maturity, and without regard to presentment or notice.[2] An accommodation indorser is obviously not a vendor.

[1] Watson *v.* Chesire, 18 Iowa, 202. In Challis *v.* McCrum, 22 Kan. 156, Mr. Justice Brewer said: "Of course no action will lie on the indorsement, for by his written contract Challis expressly declines to assume the liability of an indorser. If sustainable at all, it must be against him as a vendor, and not as an indorser, and upon the doctrine of implied warranty."

[2] Turnbull *v.* Bowyer, 40 N. Y. 456; Warren-Scharf Co. *v.* Com. Bank, 97 Fed R 181; Copp *v.* McDougall, 9 Mass. 1; Blethen *v.* Lovering, 58 Me. 437 (*semble*).

The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as indorser upon the bill after maturity and due notice of dishonor.[1] Section 66, making an accommodation indorser liable as a warrantor, ignores an important distinction, nullifies sound decisions, and does injustice to the accommodation indorser by imposing upon him a liability which he never intended to assume, and which cannot be justified on any legal principle. Section 66 should be amended by omitting everything after "qualification" in the first line to the word "engages" in the first line of the last paragraph.

There is a further criticism to be made upon sections 65 and 66. The transferor by delivery or by a qualified indorsement not only warrants, in section 65–1, 2, and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by 65–4, "that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Why should the knowledge of the transferor be irrelevant in the case of forgery, or capacity of prior parties, and yet be essential when the instrument is invalid because of usury or other statutory real defence, or, if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence? This subsection codifies the New York case of Littauer *v.* Goldman,[2] which is at variance with general judicial opinion,[3] and has been spoken of by the court of a sister state as "admittedly supported by no precedent."[4] This subsection would be consistent with the preceding subsections, if it read as follows: "That the instrument is subject to no real defence nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." Furthermore, whatever be the final form of this subsection, there seems to be no reason why it should not be incorporated, by reference, in section 66–1, if the latter subsection is to be retained in any form.

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[1] Central Bank *v.* Davis, 19 Pick. 373; Susquehanna Bank *v.* Loomis, 85 N. Y. 207 (distinguishing Turnbull *v.* Bowyer, *supra*); Case *v* Bradburn, 1 Daly, 256. The same distinction between an accommodation indorsement and an indorsement for value is illustrated by Leach *v.* Hewitt, 4 Taunt. 731, and Cundy *v.* Marriott, 1 B. & Ad 196.

[2] 72 N. Y. 506.

[3] Giffert *v.* West, 33 Wis. 617; Daskam *v.* Ullman, 74 Wis. 474; Hannum *v.* Richardson, 48 Vt. 508; Knight *v.* Lanfear, 7 Rob (La.) 172.

[4] Wood *v.* Sheldon, 42 N. J. 421, 424. See a similar criticism in Meyer *v.* Richards, 163 U. S. 385, 411, 412.

SECTION 68 declares that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." Joint makers, joint drawers, and joint acceptors are liable only jointly. Why this arbitrary discrimination? It would seem to be a blunder, that should be corrected by cancelling the last sentence of this section.

SECTION 70. "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument." This changes or would change the law, and for the worse, as to certificates of deposit, in Georgia, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, and Vermont.[1] Furthermore, presentment would not be necessary in the case of bank-notes circulating as money. The section should be amended by adding in the first line after "necessary" the words "except in the case of bank-notes and certificates of deposit."

SECTION 119–4. "A negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money." If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if a holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course. This subsection should be cancelled. It would be superfluous, even if it were accurate.

SECTION 120–3. "A person secondarily liable on the instrument is discharged by the discharge of a prior party." This subsection is the most mischievously revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all the indorsers are *ipso facto* discharged. It means that, if a joint note is executed by "A, principal," and "B, surety," and B dies, whereby the whole burden survives to A, all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy. The bankrupt law was not in force

[1] In California, Iowa, Michigan, Minnesota, and Wisconsin certificates of deposit need not be presented to charge the bank.

when the new code was recommended by the commissioners, nor when it was adopted by some of the states, and it may be repealed at any time. It is almost needless to say that there is nothing corresponding to this provision in the English act. It was doubtless developed by the draftsman from the peculiar New York case of Shutts *v.* Fingar.[1] The New York court had introduced in Merritt *v.* Todd[2] the novel doctrine that, to charge the indorser of a demand note in that state, it was not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time. Merritt *v.* Todd was followed, with reluctance, in subsequent cases. In Shutts *v.* Fingar the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of Merritt *v.* Todd, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that a presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of subsection 3. Since Merritt *v.* Todd has become obsolete through the adoption in New York of section 71 of the Negotiable Instruments Law, Shutts *v.* Fingar is now nothing more than a legal curiosity. This subsection should be stricken from the new code.

Section 120–5 and 6 declare that a release of the principal debtor or a binding agreement to give him time will discharge a party secondarily liable, unless the holder expressly reserves his rights against such party. There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance. But the question of superfluousness apart, these subsections are inaccurate in point of law. If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time, does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for,

[1] 100 N. Y. 539. A paragraph from the opinion of Ruger, C. J. (p. 545), forms the staple of Mr. Crawford's note to this section. Crawf. An. N. I. L. 84, n. (a). See, also, Crawf. An. N. I. L. 84, n. (c).

[2] 23 N. Y. 28.

under no circumstances, would they, on paying the holder, have any right either by subrogation or indemnity against the accommodation acceptor or maker. The authorities are unanimous against the discharge of the party accommodated, although he is only secondarily liable on the instrument.[1] These subsections are not in the English act, and should either be eliminated from the American act or amended. Furthermore, if it is thought best to retain them in an amended form, another subsection should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged, if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser. The authorities are almost unanimous on this point also,[2] although in a few jurisdictions the accommodation party must resort to equity for his relief. In the judgment of the writer, the wise course is to drop subsections 5 and 6 from the act.

SECTION 175 subrogates the payor for honor "to the rights of the holder as regards the party for whose honor he pays and all persons liable to the latter." This section is identical with section 68–5 of the English act. Since an accommodation acceptor is not liable to the drawer, one who pays for the honor of the drawer cannot charge such an acceptor. Lord Erskine so ruled in *Ex parte* Lambert,[3] disapproving of Lord Loughborough's decision to the contrary in *Ex parte* Wackerbath.[4] But in *Ex parte* Swan,[5] Malins, V. C., condemned with some emphasis the doctrine of Lord Erskine, and *Ex parte* Lambert has since been regarded as an overruled case.[6] In the face of this the English

[1] Collott *v.* Haigh, 3 Camp. 281; Hill *v.* Read, 6 D. & Ry. N. P. 26; Sargent *v.* Appleton, 6 Mass. 85; Parks *v.* Ingram, 22 N. H. 283. The following cases turn on the same principle: Ludwig *v.* Iglehart, 43 Md. 39; Gloucester Bank *v.* Worcester, 10 Pick. 528; Bruen *v.* Marquand, 17 Johns. 58.

[2] Ewin *v.* Lancaster, 6 B. & S. 571; *In re* Goodwin, 5 Dill. 140; Hall *v.* Capital Bank, 71 Ga. 715; Lacy *v.* Lofton, 26 Ind. 324; Adle *v.* Metoyer, 1 La. An. 254; Guild *v.* Butler, 127 Mass. 386; Canadian Bank *v.* Coumbe, 47 Mich. 358; Meggett *v.* Baum, 57 Miss. 22; Westervelt *v.* Frech, 33 N. J. Eq. 451; T. N. Bank *v.* Hastings, 134 N. Y. 501 (*semble*); State Bank *v.* Smith, 85 Hun, 200 (*semble*); Shelton *v.* Hurd, 7 R. I. 403. The opposite rule obtains in Pennsylvania and perhaps in Alabama. Stevens *v.* Monongahela Bank, 88 Pa. 157; Wilson *v.* Isbell, 45 Ala. 142. But even these states lend no support to the discharge of the accommodated drawer or indorser by a release or time given to the accommodation acceptor or maker.

[3] 13 Ves. 179. [4] 5 Ves. 574. [5] L. R. 6 Eq. 344–365.

[6] Byles, Bills (10th ed. 1874), 266, 277, and in later editions. Chitty, Bills (11th ed. 1878), 352. "The case of *Ex parte* Lambert is no longer law." 4 Am. and Eng. Ency. of Law (2d ed.), 499.

Bills of Exchange Act and the American Negotiable Instruments Law have codified the overruled opinion of Lord Erskine. Mr. Chalmers in his excellent treatise is careful to indicate every instance in which the English act modifies the previous law. But he gives no intimation that section 68–5 introduces any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest,[1] published four years before the passage of the English act, in which he defines the right of the payor of honor in substantially the same language as that of the act. Mr. Chalmers's statement of the result of the decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his Table of Cases Overruled he includes *Ex parte* Lambert as overruled by *Ex parte* Swan. Section 175 should be amended by substituting for "liable," the fourth word from the end, the word "prior." This amendment would make the section accord with the Continental Law,[2] with the California Code,[3] and with mercantile understanding.

Section 186 provides that the failure to present a check for payment within a reasonable time will discharge the drawer "to the extent of loss caused by the delay," but makes no provision for the effect of not giving due notice of dishonor when the check has been presented but not paid. Such a case must therefore be governed by section 89, with the result that the drawer is absolutely discharged, although the laches in giving notice has not caused any loss to him. This is obviously an undesirable rule, and is an innovation of the English and American codification. The courts and the text-writers give the same effect to delay in presentment and delay in sending notice of dishonor.[4]

It remains to mention briefly the omissions in the Negotiable Instruments Law. The English act deals with the effect of the loss or destruction of a bill or note,[5] defines the liability of the acceptor to the drawer,[6] and the liability of parties in default for

[1] Page 192.

[2] French Code de Commerce, Art. 159, translated in 3 Rand. Comm. Paper (2d ed.), 2836; German Wechselordnung, sect. 63, translated in 3 Rand. Comm. Paper (2d ed.), 2800.

[3] Sec. 3205, 3 Rand. Comm. Paper (2d ed.), 2727.

[4] Clark *v.* Nat. Bank, 2 MacArthur, 249; Griffin *v.* Kemp, 46 Ind. 172; Gregg *v* George, 16 Kan. 546; Stewart *v.* Smith, 17 Ohio St. 82; Purcell *v.* Allemong, 22 Grat. 739; *In re* Brown, 2 Story, 502; Story, Prom. Notes, § 493; Dan. Neg. Inst. (4th ed.) § 1587; 2 Benj. Chal. (2d ed., 270.

[5] Secs. 69, 70.

[6] Secs. 57 (1), 59 (2 a).

interest, damages, and reëxchange,[1] and contains several provisions relating to the difficult subject of Conflict of Laws.[2] There is nothing in the American act on any of these topics. Neither act mentions the duty of the drawee of a check to honor it, if in funds, nor the effect of the failure of the last indorser to receive or to transmit notices of dishonor, duly mailed with the notice to himself, to be forwarded to prior indorsers.[3] These omissions, although marring the symmetry of the new code, cannot be urged as fatal objections to its general adoption.

But if the preceding criticisms are well founded, the errors and imperfections of the Negotiable Instruments Law are so numerous and so serious that, notwithstanding its many merits, its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility.

Uniformity of amendment would be secured, and the passage by all the states of a judicious code of Bills and Notes would be accelerated, if the commissioners would reconsider the present Negotiable Instruments Law and submit it, in a revised form, with their approval, and if also they would suggest the form of supplementary legislation requisite to secure the necessary amendments in the states which have already passed the Negotiable Instruments Law. If this action on the part of the commissioners is found to be impracticable, it is hoped that the amendments proposed in this paper may commend themselves to the state legislatures. Fortunately the correction of many of the errors requires only the use of scissors.

In pointing out the defects in the new code the writer must not be understood as criticising either the zeal or the skill of the commissioners. They made a mistake, it is believed, but not an unnatural one, in view of the novelty of the work, in not securing an abundance of competent criticism, both public and private, from widely different sources, before issuing with their sanction the final draft of the proposed law. To the lack of adequate criticism must be ascribed the shortcomings of the Negotiable Instruments Law.

JAMES BARR AMES.

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[1] Sec. 57 (1), (2), and (3). [2] Sec. 72 (1), (2), and (3).

[3] Such failure discharges the prior indorsers according to Aldine Co. *v.* Warner, 96 Ga. 370; Van Brunt *v.* Vaughan, 47 Iowa, 145 (*semble*); Stix *v.* Matthews, 63 Mo 371, 375. But Wamesit Bank *v.* Buttrick, 11 Gray, 387, is *contra*.

A DEFENSE OF THE NEGOTIABLE INSTRUMENTS LAW.[1]

BY LYMAN D. BREWSTER,

PRESIDENT OF THE NATIONAL CONFERENCE ON UNIFORM LAWS.

* * * * *

It is my purpose to devote this paper to answering the specific objections submitted in the Dean's article, grouping them as far as possible for the sake of brevity.

As five of the more important strictures are equally strictures of the English Act, which has been the Law of England since 1880, the language being the same in both acts, the five can conveniently be considered together.

They are criticisms of sections 3-2, 9-5, 9-3, 29, 70. These sections in the Negotiable Instruments Law contain the following propositions:

(*a*) That a promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument."

(*b*) That an instrument is payable to bearer though it is "payable to the order of a fictitious person"—or payable to bearer.

(*c*) "Where the only or last indorsement is in blank."

(*d*) That "an accommodation party is one who has signed the instrument as maker, acceptor or *indorser* without receiving value therefor and for the purpose of lending his name to some other person."

(*e*) "That presentment for payment is not necessary in order to charge the person primarily liable on the instrument."

Answer. First, as a matter of authority, I know of no text book on bills and notes or any encyclopædia of law that does not hold the above propositions to be axioms of commercial law. They are sustained by a multitude of cases. Secondly, as to the inconvenience therefrom apprehended by the Professor, it is enough to say that none such have apparently arisen in England

[1] Reprinted, by permission, from 10 Yale Law Journal 84.

during the experience of twenty years, nor are any such apprehended by the bankers of this country, who, after giving the matter very critical attention, have given their cordial approval of the law. Perhaps a more specific discussion of two of these five strictures, applicable to both the English and American Acts, will answer for a more minute criticism of the others. One is the critique on Sec. 29, and is as follows:

"Sec. 29 defines an accommodation party as one who has signed the instrument 'without receiving value therefor and for the purpose of lending his name to some other person.' By this definition, one who has received a commission, which is certainly value, for lending the credit of his name, would not be an accommodation party. The words 'without receiving value therefor and' should be cancelled as inaccurate and misleading." The only difference I have been able to find between the language of the two Negotiable Instruments Laws and that of the ordinary definitions is that more of the text books and cases seem to use the words "without consideration" than the words "without value received." But as these expressions are made synonymous by the definitions in the Negotiable Instruments Law, Sec. 191, all the text books and modern cases agree with the Negotiable Instruments Act, as to absence of consideration. The definition in the Negotiable Instruments Law is the definition given in the new edition of the American and English Encyclopædia of Law, Vol. I, pages 335-6.

This article is a very full and complete discussion of the subject, containing fifty-eight pages on accommodation parties alone. Daniel is to the same effect. 1 Daniel 189. So also Tiedeman, Sec. 158. Byles on Bills, star paging 131. 2 Randolph 472. Norton's Horn-Book (1900) 176. Bigelow, second edition, cites the definition given by the Negotiable Instruments Law as the true definition. On page 336 of the second Encyclopædia, *supra,* the language is, "there must be an absence of consideration between the accommodated and the accommodation party." Rawle's Bouvier's definition is "Bills or notes made, accepted or indorsed without any consideration." Not only do the opinions of the judges, text books, statutes, codes, and the law dictionaries

agree on this point, but it is worthy of notice that the last leading lexicons agree exactly with the definition of the Negotiable Instruments Law so far as absence of consideration is concerned. (See last Standard and Webster *ad verbum.*) The only reason given for the overthrow of all these authorities is an illustration intended apparently to demonstrate the difficulty of showing what is value and what is not, but which in reality indicates value on its face. What is there "inaccurate and misleading" in a definition universally adopted?

Sec. 3-2, which provides that "an order or promise is not rendered conditional by the addition of a statement of the transaction, which gives rise to the instrument," is objected to as "unmeaning" and "nullifying several decisions." Here, as before, the text books and modern cases are almost unanimously against the Dean.

The instance cited by him of a note "given as collateral security" contains notice upon its face that the note is not an unconditional promise to pay, but conditional upon the non-payment of the principal debt. (See Sec. 1, Par. 2.)

The provision was intended to cover such tranasctions as a "chattel note," in order to unify the law, which has been held differently, as Dean Ames shows in the cases which he cites. The decision in New York, cited by him, to prove that the Negotiable Instruments Law did not cover such a note, Third Bank *v.* Spring, 28 N. Y. Mis. 9, has since been reversed, s. c. 63 N. Y. Supp. 410, although the Appellate Division did not base its reversal on the terms of the act. The latter decision, therefore, implies that the terms of the act have not changed the law in New York. How the provision is "obscure, inartistic and useless," as claimed by the critic, does not appear. That it is not very "obscure" seems certain or some question would have arisen under it in twenty years. Good, clear, plain English would seem to be "artistic" enough for the language of a statute. A single line which settles many discordant decisions would not ordinarily be termed "useless" or, on any interpretation, "mischievous."

The other three propositions, *"b," "c,"* and *"f,"* can easily be tested in the same way by reference to the same standard authori-

ties. In fact, I do not see how any good, practical, commercial lawyer could regard them as questionable. I shall not lumber up this reply with scores of citations of cases. The text books on these plain propositions are fully supported by the cases cited by them.

But I must condense. Of the sections of the law criticised by the Dean other than "*a*" and "*d*," already considered at length, I can best justify the conclusions of the Conference by repeating, as near as can be remembered, the offhand answers given at the time of the friendly discussion aforesaid. The fullest notes are those of Chief Justice Stiness of Rhode Island, who was chairman of the sub-committee, and has favored me with the privilege of using them. I have used them freely, making only such necessary changes as any new point in the Dean's Harvard article suggests. I take these notes in the order of the criticisms made by the Dean. The general soundness and practical wisdom of these answers, or rather of the propositions they defend, will, I believe, be confirmed by a careful examination of the best authorities.

Sec. 36-2-3. The point here made is that there is no difference between an agent and a trustee, because the agent would collect for the benefit of his principal. Hence "2 and 3 should be consolidated." All agents are, in a sense, trustees, because they are ultimately accountable to the principal. But all agents are not technically trustees. The distinction between an agent and a trustee is embodied here for the purpose of relieving a plaintiff from proving an actual trust, which would be necessary under Professor Ames' proposed substitute. A general agent might be authorized to use money quite differently from a trustee.

Sec. 137. This section holds the destruction of a bill, or a refusal to return it, equivalent to an acceptance. He concedes that a drawee, so misconducting, should be liable for a conversion. A destruction or refusal to deliver a thing is, in law, a conversion. The Dean says this section makes a refusal to accept an acceptance, and adds, "Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable." Surely this is a mere play upon words. There has been no "refusal to accept," simply a "refusal to return

within twenty-four hours." This provision was adopted in New York by statute fifty years ago.

Sec. 9-3 is criticised because it holds a note, payable to a fictitious or non-existing person, as payable to bearer. If one issues his note to a fictitious person, why should it not be treated as a note to bearer, for there is no one who can indorse it? Surely it is more logical to hold that a note, which purports to be payable to a person, when there is no such person and the maker knows it, must have been intended to be payable to bearer, than to hold that somebody must assume the name of such fictitious person, and make a false indorsement in order to give title to the note. The case supposed by Dean Ames, of a thief stealing such a note and the consequent hardship upon the maker of liability on the note as payable to bearer, when he would not be liable, because of incompleteness, if an indorsement were required, would be a rare one. His criticism seems to imply that the Act should cover rare and imaginary exceptions rather than serve the commendable purpose, which he concedes that the section has, of providing for common cases, such as notes payable to unincorporated associations, estates of deceased persons, and the like. Under his proposed substitute, if the maker completes the indorsement the same result would follow as without it. In either case, the familiar rule, that where one of two innocent parties must suffer loss, it should fall on him who has given the occasion for it, seems to be far short of "cruel injustice." There has been a variety of decisions in regard to stolen notes. 1 Dan. Neg. Inst., chap. 26, 4th ed. This section would result in a definite rule; and, being in the line of aiding negotiability, a rule which puts the loss on a man who makes notes, for fun or fraud, and leaves them so that they can be stolen and issued, rather than on one who, in due course, has taken a maker's written promise to pay, seems to be a just one. The honesty of one's holding can always be determined.

Sec. 9-5. The first objection is that it covers a note payable to B and indorsed by C in blank. Such a construction is impossible. The section clearly means that a note duly transferred and indorsed in blank, is then payable to bearer; a proposition too clear for argument, so long as the indorsement remains in that form. As Dean Ames says: "It ceases to be payable to bearer if afterwards indorsed specially." The reason why such a rule is "illogical and undesirable" is not clear. The third objection is that if, after a special indorsement, the note is transferred by delivery,

the transferee can not sue parties prior to the special indorser in his own name, but only in the name of his assignor. This is an assumption not contained in the Act. On the contrary, the effect of Par. 40, which authorizes a transfer by delivery, seems to give the transferee a right to sue in his own name, otherwise the note would not be "negotiated" within the meaning of the Act. The only limitation is that the person indorsing specially is liable as indorser only to such holders as make title through his indorsement. The proposed substitute appears to mean exactly what the Act means, since Par. 48 gives the right to strike out any indorsement not necessary to title. See also Par. 34 of Negotiable Instruments Law.

Sec. 20. The case supposed in the objection fails to show injustice. It is, if A signs a note as agent for B, mistakenly believing that he has authority, and B, a bankrupt, denies the agency, the payee should only recover from A what he might have recovered from B, the bankrupt, whereas the Act makes A liable for the face of the note. The plain answer is that one signing a note as agent for another should know and be able to show his authority. If he signs without authority, he alone in fact, and so in law, is the maker of the note, and he should be held liable accordingly.

Sec. 22, as to an infant's indorsement, is the same as in the English Act, except that the words "passes the property therein" are used in place of the words "entitles the holder to receive payment of the bill and to enforce it against any other party thereto." As the scope of the Act is confined to negotiable instruments, it does not otherwise affect the law relating to infants. Hence, the words of the two acts are equivalent in meaning, with the advantage of conciseness in the American Act.

Sec. 34 follows the English Act. Dean Ames puts the question whether if the payee writes: "I assign this note to B, or I guarantee to B the payment of this note," he would be liable on his assignment, or guaranty, and regrets that the Act does not answer the question. The liability of a party on a peculiar indorsement, which is outside of negotiability, must be settled by a court.

Sec. 37-2. The supposed injustice of this subsection, in case the indorsement was for value to the indorsee in trust for a third person, is not apparent.

Sec. 40 is claimed to be repugnant to Par. 9-5, but this is not

so. 9-5 declares a note to be payable to bearer when its last indorsement is in blank; 40 relates to a note where the last indorsement is special, and provides that it may then be transferred by delivery, in order to cover cases of good faith where title is frequently passed in that way, by persons ignorant of mercantile usage. In the case of a theft of a note from a special indorsee, which Dean Ames supposes, what harm can result? As before stated, the section validates a transfer by delivery, without the indorsement of the special indorsee, and so gives the holder a right to sue in his own name. This plainly implies proof of delivery from the owner, which would protect the parties in case of loss or theft of the note.

The first sentence of Sec. 40 is as follows:

"Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

Sec. 9-5 reads:

"The instrument is payable to bearer: . . . when the only or last indorsement is in blank."

The Dean's stricture on the assumed repugnancy of these two sections begins, "Sec. 40 . . . provides that an instrument *indorsed in blank*, although subsequently indorsed specially, may nevertheless be further negotiated by delivery." But as a comparison shows, Sec. 40 does *not* refer to an "instrument indorsed in blank," but to an instrument *"payable to bearer."* The supposed inconsistency of the two sections arises entirely from the mistaken quotation of the learned Dean.

The first sentence of Sec. 49 is as follows:

"Where the holder of an instrument payable to his order transfers it for value, without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition, the right to have the indorsement of the transferor." This section gives the transferee such title as the transferor had and the right to have an indorsement.

This is quite right. The holder in such a case, not taking title in the usual way by indorsement, may well be charged with notice of any defect in the title to the note, or of equities between the parties. The clause giving the right to require an indorsement could only be enforced in equity, upon proof of an agreement to that effect. Hence, the words added in the Colorado statute, "if

omitted by accident or mistake," were unnecessary. An indorsement so enforced would complete the title and thus cover the case of hardship which Dean Ames supposes. All cases of possible equities can not be covered by legislation.

Sec. 64 provides that one, not otherwise a party to an instrument, who puts his signature thereon before delivery, is liable as an indorser. It is to cover cases where persons put their names on the back of notes before delivery, and where they have been variously held to be indorsers, guarantors and joint makers. The section makes the rule that he shall be liable to all subsequent parties. Dean Ames says he should be liable to the maker or drawer whom he has accommodated with his signature, in cases where the maker or drawer is the payee. Apparently, his idea is that if he is not liable to the drawer-payee, no title can be passed by the latter. But subsection 2 makes the party liable as indorser to all parties subsequent to the maker or drawer. The Dean's proposed substitute would defeat the purpose of the Act, which is to put the irregular party into the place of the indorser, by making him practically a joint promoter, because his signature would precede that of the indorser.

Sec. 65 makes a person, who transfers a note by delivery or by a qualified indorsement, warrant certain things. It then says: "But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee." Dean Ames objects that this last clause makes the warranty of the indorser, which is that of a vendor, run in favor of all subsequent holders, which he says is "an original invention of the Negotiable Instruments Act. But this is its only merit."

The Dean is unjust to himself. In 2 Ames, Cases on Bills and Notes, Index under head of "Indorser without recourse," 840, 882, is this syllabus: "An indorsement without recourse, like a transfer by delivery merely, being, in substance, a sale, the indorser is responsible to the indorsee *and subsequent holders* for the validity of the title and the genuineness of the instrument which he purports to sell." The selected case is Blethen *v.* Lovering, 58 Me. 240. It was not a case of subsequent parties, but the long note appended to it does not in this respect distinguish the case from the syllabus in the index.

The same rule is stated so far as relates to a qualified indorsement in Fourth Am. & Eng. Encyclopædia of Law, second edition, 481, in almost the same words, and in 1 Daniel on Negotiable In-

struments, fourth edition, Par. 670, the language is: "The holder may sue the indorser." This is enough to show that the framers of the Negotiable Instruments Law must disclaim the credit of the invention which is accorded to them.

In the new Norton on Bills and Notes (Horn-Book Series), page 167, the editor gives the subsection in question from the Negotiable Instruments Law as the true law on qualified indorsements, quoting 2 Ames, Cases on Bills and Notes, 840, 882, as his authority. He seems to doubt, however, whether, among the conflicting cases, it was the law before made so by the Negotiable Instruments Law. He also thinks that the law laid down by Professor Ames in the passage above quoted that the warranty of the transferor by delivery also extends to subsequent parties, while not accepted as law elsewhere, ought to be the law. So that, instead of being guilty of the heinous crime of "novelty," the Negotiable Instruments Law is, on this matter, more conservative than either the Norton Horn-Book or Dean Ames' leading cases, where it lays down the rule, that "when negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee." The reasonableness of making a distinction between a transferor by delivery and an indorser without recourse, because in one case the name is on the paper and in the other is not, may or may not be doubtful. Norton's Horn-Book, Sec. 79, says they stand "much upon the same footing"; Dean Ames says their liability is identical. But that a certain and definite rule should be adopted, nobody can doubt.

Sec. 66 is more explicit and does make a change in the law, but it is in the line of aiding negotiability. It follows the English Act (Par. 55) in holding an indorser liable to a holder in due course, as to genuineness and regularity, and extends the liability only as to the warranty that the note was valid at the time of his indorsement. As a note usually gets its strength from the names of its indorsers, it seems to be just that the warranty should be included, if, indeed, it really adds anything to the English Act.

Sec. 68 treats joint-payers and indorsers, who indorse, as indorsing jointly and severally. Theoretically, this may, as the Dean says, "seem to be a blunder." But, practically, it is a convenience in suing, and was, doubtless, inserted for that purpose.

Sec. 70 provides that presentment for payment is not necessary to charge the person primarily liable on the instrument. The section was intended to apply to the maker of a note, who, of course, is liable if he does not pay according to its tenor. But, the Dean says, "it should except the cases of bank notes and certificates of deposits." In view of the fact that no person would be likely to bring a suit on such instruments when he could get the money at the bank, and the further fact that no harm could come to the promisor, excepting as to costs, which are in most, if not all the states, subject to the discretion of the court, the objection does not seem to be practical.

Sec. 119-4 provides that an instrument is discharged by an act which will discharge a simple contract for the payment of money. The objection is that if the holder of a note accepts a horse in satisfaction, before maturity, and then transfers the note, the maker is still liable. The section evidently relates to acts between the parties. If the maker allows his note to remain outstanding, and so to be transferred, of course he should be held liable.

Sec. 120-3 discharges a person secondarily liable by the discharge of a prior party. This, too, evidently means some act between the parties. The law has long been settled that the discharge of the liability of a bankrupt maker of a note does not affect the liability of the other parties on the note. It is generally held that the statute of limitations against an indorser runs, not necessarily from the date of the note, but from the time when the indorser's liability accrues. When, therefore, the language of subsection 3 is used (exactly as given in a number of the text books), it of course refers to a discharge by the holder and not a discharge by act of the law, as the whole context, referring to acts of the parties and not to any acts of the law, clearly indicates. Thus Randolph, second edition, Sec. 769, says, "The release of a prior indorsement discharges subsequent indorsers," assuming of course their release by the holder. That this is the natural meaning and interpretation of subsection 3, Sec. 120, is fairly inferable from this fact. Ten books on commercial paper have been published since the Negotiable Instruments Law was legislatively adopted. All of them treat more or less fully of that law; Huff-

cut, Randolph, Bigelow, Norton, generally, and Selover and Crawford and the special books on the New York and Colorado Acts treating of that Act alone. Not one of these ten authors intimates that subsection 3 has changed the law in the slightest degree. In all the reports of the various Commissioners to their respective states, elaborately stating every change of law made by the Negotiable Instruments Law, no allusion is made to subsection 3.

It is not necessary in this instance to invoke the aid of the rule of law stated in Sutherland on Statutory Construction, Sec. 156, that codes which condense and reaffirm in general the rules of the common law, do not repeal the exceptions to these rules which they reaffirm; or the similar doctrine in Endlich on Statutes, sections 127-205, that in statutes or revisions condensing or in general re-stating the common law, no change is presumed except by the clearest and most imperative implication.[1] How far this doctrine is carried in England, in regard to the Bills of Exchange Act, is shown in the case of Bank of England v. Vagliano, L. R. 1891, Appeal Cases, page 144. But were this doctrine invoked the simplest application of the rule or of Sec. 196 would at once relieve the subsection in question of the ministerpretation put upon it by the Dean. Nevertheless our critic, whose adjectives here and there are surprisingly vigorous, describes this aphorism of the Law Merchant as "the most mischievously revolutionary provision of the new code." [2]

As to subsections 5 and 6 of Sec. 120, the objection of inaccuracy is based upon the case of an accommodation drawer or

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[1] Because of the necessity of preserving this presumption in all its integrity, the sub-committee declined to accept some slight changes proposed by the Dean, such as adding to subsection 120-3 the words "by the holder." It would be (1) assuming a doubt where we had no doubt, and (2) assuming the doctrine from Sutherland and Endlich, *supra*, not to be true. A doctrine without strict adherence to which codes would have to be as long as text-books.

[2] The reasons attributed by the Dean for one or two of the changes of the law, made in the Negotiable Instruments Law, are, I think, misapprehensions. I expected to have received from Mr. Crawford, the draftsman, a paper stating the real grounds for such changes, in his own mind, but pressure of business on his part has prevented him from rendering any assistance during the brief time allowed for the preparation of this article, and the same is true of my colleagues on the committee. So the responsibility for any heresies in this paper must rest on my own shoulders.

indorser, because he says that the authorities are unanimous against the discharge of the party accommodated. Undoubtedly that is so, and it is difficult to see how the law could be construed to cover such a case. The law is intended to set out the legal liability on the instruments as such, in the due course of commercial transactions. It could never be held to mean that a party who had paid money for another's accommodation could not, at law, if not on the instrument, recover it back. That is a matter between the parties, entirely outside of the effect of the instrument in the hands of a holder.

Sec. 175 is the same as in the English Act, and whatever may have been the difference in English decisions, it was, doubtless, deliberately adopted, and certainly it seems to be just. One who pays for the honor of the drawer is as much an accommodation party as the accommodation acceptor and has no equity superior to that of the latter. But even if Mr. Chalmers and Mr. Crawford are wrong in preferring the law of Lords Kenyon and Erskine to that of Lord Loughborough, and Malins, V. C., now that Lord Kenyon's ruling is the law of Great Britain, and has been followed in several of the States (see cases cited in note 2, page 499, vol. 4 of second edition of Am. & Eng. Ency. of Law) and as uniformity is one of the main objects of the Negotiable Instruments Law, no mistake is made in leaving Sec. 175 as it stands.

Sec. 186. The objection is that, under Par. 89, upon presentment and dishonor notice must be given to the drawer of a check or he will be discharged. Suppose it is so, technically, with reference to the check itself. What is the harm? The debt is not discharged, except for laches. The holder can sue on his debt just the same as he could have done before the check was given. In some states a check is not held to be enough of a negotiable instrument to sustain an action. It is held as an order, with no promise to pay. The section seems to be harmless in any view.

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LYMAN DENISON BREWSTER.

THE NEGOTIABLE INSTRUMENTS LAW.[1] A WORD MORE.

BY JAMES BARR AMES.

UNDER ordinary circumstances Judge Brewster's "Defense of the Negotiable Instruments Act" in the Yale Law Journal for January would be allowed to close the very friendly controversy begun by a criticism of that Act in the December number of this REVIEW. But it is so much wiser and simpler to avoid the commission of legislative errors than to correct them subsequently that the writer deems it his duty to add to his former paper this short supplement by way of meeting some of the arguments of the learned Chairman of the Committee on Uniform Laws, and of reinforcing some of his own criticisms.[2]

As to the objections to sections 20, 36–2 and 3, 49, 66, 68, 137, and 175 it seems unnecessary to say anything more than that his criticisms still seem to the writer to be valid. In dealing with the other sections criticised, he will follow the order of the Act.

By SECTION 3–2 an order or promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument." These very general words, Judge Brewster tells us, were intended to cover the specific case of a "chattel note," that is, a note stating that it "is given for a chattel which is to be the property of the holder until the note is paid." He tells us further that this subsection could not apply to a note containing the words "Given as collateral security for A's debt to the payee," because such an instrument "contains notice on its face that it is not an unconditional promise to pay." But that is the precise ground upon which "chattel notes" are held to be non-negotiable in Massachusetts. In Sloane *v.* McCarty,[3] Field, J., said: "The obligation of the defendant to pay the money is in legal effect

[1] Reprinted from 14 Harvard Law Review 442.

[2] Since the sections criticised and the criticisms must stand or fall upon their intrinsic merits or demerits, any allusion to the critic's qualifications by reason of his previous training or experience would seem to be irrelevant. But since the learned Chairman draws therefrom the inference that "a fulness of expression amounting to prolixity" would be demanded, in order to give effect to the writer's strictures upon the Act, it is right to say that the adoption of his proposed amendments would shorten the Act by something more than a dozen lines.

[3] 134 Mass. 245, 246.

conditional upon the title vesting in him when the money is paid in full, and this condition appears on the face of the contract." The learned Chairman demonstrates, therefore, by his own reasoning, that this subsection must fail to work in the very case for which it was framed.[1]

SECTION 9–3. Fictitious payee. In his criticism of this provision the writer tried to make it clear that, as a matter of actual experience, one who makes an instrument payable to a fictitious person always indorses it in the name of that person before issuing it, and that such an instrument is in effect, though not in form, the same as one payable to the order of the drawer or maker. By the Revised Statutes of New York, of 1830, a note payable to the order of the maker was declared to be payable to bearer, and was negotiable by delivery merely, without indorsement. This legislation was copied in at least nine states.[2] But it has been repealed in New York, North Dakota, Oregon, and Wisconsin by section 184 of the Negotiable Instruments Law, which declares that a note payable to the maker's own order "is not complete until indorsed by him." The recommendation of the writer is that a bill or note payable to the order of a fictitious person be dealt with in the same way by enacting that such a bill or note, when indorsed by the drawer or maker in the name of the fictitious person, but only when so indorsed, shall have the effect of paper payable to the order of, and indorsed by, the drawer or maker. Suppose two notes, one payable to the order of a fictitious person and one payable to the order of the maker, but neither of them indorsed, to be lost or stolen and to come to the hands of an innocent purchaser. Where is the logic or the justice in a statute which makes the maker liable in the one case, but not in the other?[3]

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[1] It may be, as the writer believes it to be, an error to regard a "chattel note" as a conditional promise. But courts which commit this error will probably agree with Judge White, the only judge who has passed upon section 3–2, that this provision "has no application" to such a note. On this point Judge White's opinion was not impeached by the reversing opinion in 50 N. Y. Ap. Div. 66.

[2] Rand. Neg. Pap. (2d ed.) sec. 153 n., 401.

[3] If Judge Brewster's startling suggestion that notes payable to the order of unincorporated associations or the estates of deceased persons are payable to bearer by force of this section 9–3, this provision is far more mischievous than the writer had supposed. Is a note payable to the order of a joint stock company unincorporated, or to the order of John Smith & Co., for a partnership is an unincorporated association, payable to bearer? This is incredible. There is a *dictum* in Lewisohn *v.* Kent, 87 Hun, 257, that a note payable to the order of the estate of A is payable to bearer. But surely it is a perversion of language to call the payee in such a note a fictitious or non-existing person. In Shaw *v.* Smith, 150 Mass. 166; Peltier *v.* Babillon, 45 Mich.

SECTIONS 9–5 and 40. Special indorsement of paper payable to bearer. Prior to the Bills of Exchange Act an instrument payable to bearer (or indorsed in blank), although afterwards indorsed specially, was still negotiable by delivery, as if the special indorsement were not upon it. Hence, even though the bill had been lost by, or stolen from, the special indorsee, any honest purchaser from the finder or thief acquired an indefeasible title to the paper. This was thought to be unjust to the special indorsee, since the buyer had notice on the face of the bill that it had become the property of the special indorsee, and ought, therefore, to make out his right through an indorsement or assignment by the special indorsee. To remedy this injustice was the object of section 8–3 of the English Act, which is reproduced in section 9–5 of the American Law.

The objection to this provision is this: If the special indorsee transfers the instrument by delivery merely, the transferee not being an indorsee, is not a holder [1] and not being a holder cannot, under section 48, strike out indorsements, and so, in order to recover against parties antecedent to the special indorser, must sue in the name of the special indorsee.

Section 40 of the American statute has no counterpart in the English Act, and, by providing that an instrument payable to bearer, although indorsed specially, "may nevertheless be further negotiated by delivery," seems to the writer to nullify the innovating section 9–5, and to leave the law as it was in England before 1882. Judge Brewster seeks to avoid this result by reading section 40 as if it contained, after the word 'negotiated,' the words "by the special indorsee," thus restricting the further negotiation by delivery to a delivery by him. The suggested explanation is, to the writer, far from convincing. He cannot escape the conviction that it is an afterthought. Had the framers of the Act fully realized that section 9–5 was an innovation, and that the language of section 40 was almost identical with that used by judges and text-writers to define the superseded doctrine,[2] one

384, such a note was properly interpreted as a note payable to the legal representative of A. Mr. Chalmers, who drew the English Act, says that a note payable to a deceased person is payable, since the Act, as it was before it, to his personal representative. Chalmers, Bills of Exch. (5th ed.) 23, 24.

[1] N. I. L. sec. 191.

[2] "Continues to be assignable by mere delivery." Chitty, Bills (11th ed.), 173. "Is transferable by mere delivery." Story, Prom. Notes (7th ed.), § 139. "Is afterwards negotiable by mere delivery." 4 Am. & Eng. Encycl. (2d ed.) 252. "Remains transferable by delivery." 2 Rand. Neg. Pap. § 705. "The negotiability is not restrained." Chalmers, Dig. (1878) 96.

must believe that, either they would have followed the English Act, and omitted section 40, or else have abandoned the language of the discarded rule along with the rule itself. Furthermore, to interpolate the additional words is to take an unwarrantable liberty with the statute.

SECTION 22. Indorsement by an infant. The learned Chairman informs us that this section is the same in effect as the corresponding section of the English Act. Other members of his committee assured the writer that the purpose of this section was to give the infant's indorsee an indefeasible title to the instrument. This is not the effect of the English Act. If the framers of this section are not agreed as to its scope, its reference back to the committee for revision would seem to be in order.

In SECTION 29 an accommodation party is defined as one who signs "without receiving value therefor, and for the purpose of lending his name to some other person." This definition was criticised by the writer as excluding the case where the signer receives a commission for lending his name, and the omission of the words "without receiving value for and" was recommended. Judge Brewster shows that the language in this section is the current definition of the books. But this does not meet the criticism. It may indicate only that he and his colleagues erred in good company. To take a concrete case. A offers B $10 if he, B, will sign a note of $1000 for A's accommodation. B accepts the $10 and signs the note. Can any one seriously doubt that B is an accommodation party? If he is, the definition in this section is erroneous.

SECTION 34. The definition of indorsement. A note, a bill, and an acceptance are carefully defined in the Negotiable Instruments Law. To the writer's criticism upon the absence of a definition of an indorsement which would remove the conflict of decisions in cases where the payee writes: "I assign this note to B," or "I guarantee the payment of this note to B," Judge Brewster replies that "the liability of a party on a peculiar indorsement which is outside of negotiability must be settled by a court." But the very point in controversy is one of negotiability, as it was in the case of notes containing a promise to pay attorney's fees. It is unfortunate that an excellent opportunity to unify the law was neglected.[1]

[1] In ten states a payee who transfers a note by writing on the back, "I assign this note to X," assumes the liability of an ordinary indorser. In six states such an

Section 37. Restrictive indorsement. A, the holder of a note payable to his order, sells it to B and is about to indorse it to him, but, at B's request, indorses it to X in trust for B, instead of to B directly. At the maturity of the note the maker is insolvent, but A is solvent. By this section, X, the indorsee, may sue any one that his indorser can sue. In other words, he may sue the insolvent maker, but he cannot sue the solvent indorser, A. Judge Brewster sees no injustice to B in the inability of X, his trustee, to sue A, upon the latter's indorsement. Let us hope that the learned judge may never find himself in B's situation.

Section 64. Anomalous indorser. Judge Brewster seems to have misapprehended the writer's criticism upon this section. If A makes a note payable to X or order, gets B to indorse it and delivers it to X in exchange for goods, B is liable, under this section, to X and all subsequent parties. If, however, A accepts a bill drawn by X, payable to the order of X, gets B to indorse it, and delivers it, as before, to X for goods purchased, B, under this section, is not liable to X, but only to subsequent holders. And yet the business relations of A, B, and X are obviously identical in the two cases. In each X sells to A on credit, trusting to the responsibility of both A, the buyer, and B, the surety. The amendment suggested by the writer [1] secures to X the just protection which this section in its present form denies him.

Section 65–4 makes the novel distinction that, while a transferor by delivery is liable on his warranty of genuineness only to his immediate transferee, an indorser without recourse, because his name is on the instrument, is liable to all subsequent holders. This distinction was criticised on the ground that the warranty in both cases was extrinsic to the instrument, being merely the warranty of a vendor, and therefore running to the vendee only. The learned Chairman makes merry with the critic by quoting a statement from the Summary of Ames's Cases on Bills and Notes [2] as the first printed expression of the idea that an indorser without

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assignor is not an indorser. In thirteen states the assignee, like an indorsee, acquires title free from equities good against the assignor. In two states the assignee takes subject to such equities.

In three states a payee who transfers a note by writing on the back, "I guarantee the payment of this note to X," is liable as an indorser. In ten states he is not so liable. In thirteen states the transferee, like an indorsee, acquires a title free from equities good against the transferor. In three states and in the Supreme Court of the United States, the transferee takes subject to such equities.

[1] 14 Harvard Law Review 250. *Supra*, p. 427. [2] 840, 882.

recourse is responsible as a warrantor to the indorsee and subsequent holders. The writer frankly confesses that a youthful indiscretion, committed so long ago that it had passed from his memory, made him fair game for the alert sportsman. But, after all, he is not so black as he is painted. In his callow days he never entertained the heresy that the indorser without recourse was liable on the instrument, or that there was any difference between his obligation and that of a transferor by delivery. The liability of each is described in the Summary in the same forms and as extrinsic to the instrument. Nor did he consider that the obligation of either was negotiable. He regarded the warranty as an assignable chose in action, with this peculiarity, that it passed, with the bill or note as an incident, without any express assignment.[1] The writer is indebted to Judge Brewster for recalling to his mind this forgotten conception, for it suggests an additional objection to this subsection. The distinction introduced between the transferor by delivery and the indorser without recourse must rest upon the fact that the name of the latter is upon the paper, and upon the assumption that such an indorsement is like a regular indorsement, except that the liability is limited to a warranty of genuineness and the like, and, therefore, runs in favor of all subsequent holders.[2] In other words, the indorsement is negotiable, and not merely assignable. A concrete case illustrates the difference. The holder of a bill containing several prior indorsements is induced by fraud to transfer it by an indorsement without recourse. The fraudulent indorsee transfers it to a holder in due course. The signature of one of the prior indorsers turns out to be a forgery. If the warranty of the defrauded indorser is merely an extrinsic, assignable chose in action, the holder in due course, having only the rights of the fraudulent indorsee, cannot charge him; if, on the other hand, as this section of the Act must mean, his obligation is a qualified negotiable indorsement, he is chargeable by the holder in due course. This result will hardly commend itself to any one.

Section 70. Presentment for payment. To the unqualified statement in this section that "presentment for payment is not

[1] He agrees now with Dillon, J., that an express assignment is necessary. Watson *v.* Chesire, 18 Iowa, 202.

[2] Similarly, in section 66, the two liabilities of the regular indorser — the warranty of genuineness and the engagement to pay upon due notice of dishonor — are grouped together, and made to run in favor of all subsequent holders, as if both arose upon the instrument itself.

necessary to charge the person primarily liable" the writer objected that an exception should be made in the case of bank notes and certificates of deposit. This objection seems to the learned Chairman unpractical. An objection which gives effect to the express intention of the parties and has the support, as to certificates of deposit, of the decisions in at least nine states, would seem to be sufficiently practical.

SECTION 119–4. It is said in defence of this subsection that it relates only to acts between the parties, and that the holder's acceptance of a horse in satisfaction of a note, if before maturity, does not discharge the maker as against a holder in due course. This is very sound law, but, with all deference, this subsection declares just the opposite. The language is that by such an accord and satisfaction "a negotiable instrument is discharged." If it is discharged the maker can never be charged upon it. In all the other subsections of this section the discharge is complete and final.

SECTION 120. Judge Brewster says that "discharge of a prior party" in subsection 3 means a discharge "by the holder." To add the words "by the holder" seems to the writer as unjustifiable as the unsuccessful attempt that was made in Vagliano's case [1] to add to the section of the English Act relating to fictitious payees the words "to the knowledge of the acceptor." Furthermore, if the words were added, to what possible case would this paragraph apply which is not covered by the other paragraphs of this section? Finally, if the words are added, this subsection would still be indefensible, for it certainly discharges the accommodated indorser of a note, if the holder, with knowledge of the accommodation, should release the accommodating maker. This would be a shocking result and contrary to all the reported decisions on this point. This same illustration demonstrates the inaccuracy of paragraphs 5 and 6 of this section.

SECTION 186 provides that the holder's failure to present a check discharges the drawer only to the extent of loss caused by the delay. To the writer's criticism that, under section 89, the failure to give the usual prompt notice of dishonor of a check discharges the drawer irrespective of any loss to him, and that this is unjust, the learned Chairman replies, that no harm is done, for the holder may sue upon his original claim. But in all other cases

[1] 1891, App. Cas. 144.

a creditor who, by his laches, discharges his debtor from liability on a bill given in conditional payment of a debt, forfeits also all right to the debt. Furthermore, suppose a check to be given in absolute payment of the drawer's debt, or in consideration of the payee's release of a claim against a third person. Surely, in either of these cases, the holder, who loses his right on the check, has lost everything.

The writer's criticisms upon the new code may be summed up as follows: —

Section 3–2 is either useless or provocative of litigation. Section 36–2 might well be merged with section 36–3. Section 137 crystallizes an unscientific conception without any compensating advantage.

Section 29 is an erroneous definition. Section 34 is an inadequate definition. Sections 9–5 and 40 are repugnant. Section 68 introduces an unprecedented and arbitrary distinction. Section 70 would settle a conflict of decisions against the majority opinion, which is that of the chief commercial states. Section 175 copies the blunder of the English Act which codified an overruled decision.

Sections 9–3, 20, 37, 49, 64, 65–4, 66, 119–4, 120–3, 120–5, 120–6, and 186, taken with section 89, establish rules opposed alike to justice and to well-established law. Their enactment must inevitably be followed, sooner or later, by additional legislation to remedy the evils they would introduce.

The writer desires to repeat his opinion that the general adoption of the new code, properly amended, would be greatly to the advantage of the mercantile community. But unless the statements in the preceding two paragraphs can be disproved, the passage of the Act in its present form in a single additional state should be an impossibility.

James Barr Ames.

THE NEGOTIABLE INSTRUMENTS LAW.[1] A REJOINDER TO DEAN AMES.

BY LYMAN DENISON BREWSTER.

* * * * *

A word of recapitulation and introduction may be allowed before making a direct reply to "One Word More" in the February number of the Harvard Law Review.

Of the twenty-three subsections of the law to which the critic objects, eleven are taken from the English Bills of Exchange Act,[2] one follows the German code,[3] one is taken from a New York statute,[4] three are mere matters of form,[5] and the objections to the remaining seven chiefly come, it would seem, from misinterpretations of the meaning of the law on the part of the critic.

The eleven subsections taken, most of them word for word, from the English Bills of Exchange Act, and all so identical therewith that the critic's objections apply to the acts equally, need no justification at this late date. They have been the satisfactory law of England and her colonies for twenty years. On them criticism is barred by the natural statute of limitations and the universal approval of the commercial world. One might as well criticise the Bill of Rights or the Lord Chancellor's wig. No text-book that I know of holds any doctrine contrary to the law of these eleven sections. Nor in fact has the Dean suggested any text-book which is in favor of any one of his twenty-three strictures. * * *

Section 20, it is claimed, makes by implication an unauthorized agent liable personally on the note. In addition to the answer already given, *i. e.*, "that the agent alone is in law, as in fact, the real maker of the note" in such cases, and might well be made directly liable, as he always is ultimately, it is proper to refer to

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[1] Reprinted from 15 Harvard Law Review 26.

[2] 3-2 from 3-3 of English Act; 9-3 from 7-3, with an addition not in question; 9-5 from 8-3; 22 from 22-2; 29 from 28, 37-2 from 35-2; 49 from 31-4; 70 from 52; 175 from 65-5; 186 from 74, and 66 from 52-2.

[3] Sec. 20, art. 95, German Exchange Law.

[4] Sec. 137.

[5] 36-2, 36-3, 37.

the fact that the rule which the Dean claims is laid down in the Negotiable Instruments Law is adopted in the German Code, to which the Dean refers us as a model,[1] and is declared in Byars *v.* Doores,[2] as having "the weight of authority" decidedly in its favor at that time. Tiedeman (sec. 84) cites eleven cases so holding, to which we may add 147 Ill. 520; 104 Ind. 32. There are more cases one way and more states the other.

The Dean's criticism on sections 37-2-3 was that the word "trustee" was more descriptive of the position of the indorsee in restrictive indorsement than the word "agent," and so but one word should be used. It is proper to say that the text-writers take exactly the opposite view,[3] and so did Dean Ames when he published his Leading Cases. In his Index and Summary, p. 837, is the following section:—

"The term 'restrictive indorsement' is commonly but loosely applied to *two distinct kinds of orders,*[4] namely, to an order whereby the holder indorses a bill to one person in trust for another, *e. g.*, 'Pay A for account of B'; 'Pay A for the use of B'; and to an order whereby the holder simply deputes to an agent the business of collecting a bill, *e. g.*, 'Pay to A for my use.'" It was with reference to this "common," *i. e.*, ordinary use of the word that the section in question was framed.

Mr. Tiffany, in the new Norton Hornbook on Bills and Notes, as usual hits the exact distinction tersely and clearly (p. 124):—

> "The first and commonest variety, and the one which is generally spoken of by the text-writers as the restrictive indorsement, is that where the holder deputes to some other person the business of collecting the bill; the other where the holder indorses the instrument to one person for the use or benefit of, or as the trustee of another."

Regarding section 49, which treats of the right to have the transferor indorse, which follows the English Act and does not follow the Colorado Act, as the critic would have it do, it may be pertinent to say that the annotator of the Colorado Act, Mr.

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[1] American Law Register, March, 1900, vol. 39, p. 145.
[2] 20 Mo. 284.
[3] See especially Chalmers, 5th ed.; McLaren on Canadian Bills of Exchange Act, 214; Tiffany's Norton, 124.
[4] The italics are ours.

J. Warner Mills (p. 23), says, speaking of the two forms of expression, "but either form of expression establishes the equitable rule of law." [1]

Section 66 is substantially in the line of section 55 of the English Act, as already suggested.

Section 68, making joint indorsers liable severally, which the critic called "a blunder," and now calls "unprecedented" and "arbitrary," is in accord with the theory of the law already established in most of the states which adopt the reformed procedure, say three-quarters of the states of the Union.[2] "The liability of each indorser is several. So now by statute generally." [3]

Section 137, making destruction of a bill of acceptance, at first was objected to as "a perversion of language," "fantastic and inexplicable." [4] It is now described as "crystallizing an unscientific conception." Whether it is fantastic, or crystalline, or scientific, is not, perhaps, so very material. But instead of its being "a conception" of the draftsman or of the conference, the section was taken from the statutes of eight states, including the state of New York, from all of which the report was that "it had worked well." The bankers regarded it as a simple, practical, definite working rule, and none of the twelve commentators on the Negotiable Instruments Act have suggested the least objection to it.

Section 175. Payment for Honor. The Dean argued in the December number of the Review that because Mr. Chalmers adopted in the English Bills of Exchange Act the doctrine of an overruled case,[5] the fact of its having been overruled must have been overlooked. By reference to note 3, page 237, of the fifth edition of Chalmers, he will see that the overruling case [6] is duly cited as well as the continental codes. There was no "slip of memory" there. Daniel favors the overruled case.[7]

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[1] See also, Huffcutt, 26, to the same effect.

[2] Connecticut Rules of Practice, p. 1, sec. 2; 2 Bliss, 53; Pomeroy, 2d ed., 326.

[3] Norton, 159.

[4] See our answer to these adjectives and others, 10 Yale Law Journal, 88, January, 1901.

[5] *Ex parte* Lambert, decided by Lord Erskine.

[6] *Ex parte* Swan.

[7] Daniel, sec. 1255; Norton, 301.

DIRECT ANSWER TO "ONE WORD MORE" IN THE FEBRUARY NUMBER.[1]

Section 3-2. This section asserts the familiar doctrine that an order or promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument." [2] The Dean's first article declared this clause "unmeaning, deplorable, nullifying several decisions," and either "mischievous" or "obscure, inartistic, and useless." He cited, to show the inefficiency of the Negotiable Instruments Act on this point, the case of Third Bank *v.* Spring,[3] an Erie County Supreme Court case, in which he said "the judge ruled that the Negotiable Instruments Law had no application to such a note." In the answer it was stated that that case was reversed in the Appellate Division.[4] The Dean now replies that the reversal did not affect the point he made that the Negotiable Instruments Act was not applicable. On reëxamination it turns out that the note in question in that case was made in 1896 and negotiated in May, 1897. Whereas the New York Negotiable Instruments Law did not go into effect until October, 1897, and therefore, as the judge said, had no application to it. The law had not then become operative in the state of New York.
* * *

Next page, in note 3, the Dean speaks of "Judge Brewster's startling suggestion that a note payable to the order of unincorporated associations or the estates of deceased persons is payable to bearer by force of this section 9-3." But in point of fact, by referring to the answer published in the Yale Law Journal, on the criticism on section 9-3, it will be seen that, instead of being put down as a statement of the writer in the Law Journal, it is put down as follows:—

"His [the Dean's] criticism seems to imply that the act should cover rare and imaginary exceptions rather than serve the commendable purpose which he concedes that the section has, of providing for common cases, such as notes payable to unincorporated associations, estates of deceased persons, and the like."

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[1] Harvard Law Rev. 442.
[2] English Act, 3-3; 4th Am. & Eng. Enc. of Law, 89, citing 43 cases.
[3] 28 N. Y. Misc. 9.
[4] 50 App. Div. 66.

If the concession is denied, that is a question of fact. If it is admitted, is it quite right to exploit one's own admission as the opinion of his opponent? As to the section criticised, it is not only more conservative than the English act, but it is so laid down in the text-books.[1] As to the doctrine of the illustration itself, to wit, that the estate of one deceased is regarded as a fictitious payee, the only point about that was that it was convenient in such cases to use a fictitious name.

"How far afield a figure sometimes leads."

Is section 40 inconsistent with subsection 9-5?

Subsection 9-5 reads as follows:—

"The instrument is payable to bearer when the only or last indorsement is an indorsement in blank."

Section 34 is:—

"A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery."

Section 40 is:—

"Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

How, giving the language of section 34 its legitimate effect, there is any repugnancy between subsection 9-5 and section 40, I have never been able to perceive. Without rediscussing whether the critic was justified in changing the language of section 40, in the first article, or whether the substantive "negotiation" in section 34 applies to the verb "negotiated" in section 40, I much prefer to refer the reader to the full and clear exposition of the whole matter in the new Norton Horn-Book, pages 110 to 118. Mr. Tiffany's paraphrase of section 40 on page 116 assumes that the words "indorsed in blank" are equivalent to the words "payable to bearer," and is as follows:—

[1] Daniel, 119; Randolph, 169; Tiedeman, sec. 243.

"An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it."

But what is the result of this interpretation? In the new Norton Horn-Book, not only do 9-5 and 40 stand as good law, but after going over all the cases on pages 116-17-18, and after stating that the application of the rules "is somewhat confusing to the student," Mr. Tiffany sums up as follows:—

"The rule is well settled that if a note or bill be once indorsed in blank and afterwards indorsed in full, it will still, as against the drawer, payee, and prior indorsers, be payable to bearer, though, as against the special indorser himself, title must be made through his indorsee."

In other words, Mr. Tiffany finds no inconsistency at all. Subsection 9-5 and section 40 stand in perfect harmony. In fact, one is the complement of the other.

As to section 22, the Dean's claim is that some members of the committee informed him that they interpreted the section differently from the interpretation given in the Yale Law Journal. I can only say that I never heard of any other interpretation, nor was any such intimated when the committee reported to the conference that they found none of the Dean's criticisms tenable.[1]

Section 29. Accommodation Paper. One hardly knows what language to use in characterizing the serene self-confidence with which the Dean reiterates his conviction that everybody is wrong in defining accommodation paper as paper without consideration. Having shown in the answer that not only all the cases, all the text-writers, and all the encyclopedias, the law dictionaries, and the ordinary English lexicons, are against him, and all give the same definition as the Negotiable Instruments Act, his only reply is that "the conference erred in good company." It is the Dean against the world. Therefore, so much the worse for the world. This eccentric heresy of the Professor makes his illustrations referring to accommodation parties utterly meaningless. The contestants are not using the same yardstick.

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[1] For the fair interpretation of section 22 see the new edition of Norton's Horn-Book 220, and note 15 therewith.

The original criticism on section 34 was "that it nowhere stated that an indorsement is an order, and nowhere defined the difference between a guaranty and an indorsement." Our answer was that it was for the court rather than for a code on negotiability to settle questions outside of negotiable instruments. The new criticism is that "it is unfortunate that an excellent opportunity to unify the law was neglected." Yet in his first note the Professor prides himself on the fact that the adoption of his proposed amendments would shorten the act by something more than a dozen lines. One ventures to say that if this "excellent opportunity to unify the law" by laying down the law of assignments and guaranty were embraced, and the omissions which the Dean recommends at the end of his first article were also added, the Negotiable Instruments Law would have contained fifty instead of thirty-six pages.

Section 37 is an exact copy of the English Act. The fact that no trouble has arisen under it in England sufficiently indicates that the immunity the Dean claims for the solvent indorser "A" does not exist. Equity would take care of that.

Section 64. Anomalous Indorsers. One must answer the algebraic illustration of the supposed misapprehension of the present writer on the Dean's first criticism by giving a Roland for an Oliver. For the lamentable fact is that the Dean seems to have misapprehended the answer already given and the reasons stated why his first proposed substitute would defeat the purpose of the act. In the careful examination of this section by Mr. Tiffany,[1] the editor says, after referring to the previous "chaos of conflicting authorities," and speaking of the rule laid down in the Negotiable Instruments Law, as "an important step toward uniformity on this subject," that "it has the further advantage that it abolishes so-called 'presumptions,' lays down definite rules

[1] Norton's Horn-Book, pages 138-143.

of liability; and that it probably gives expression as nearly as possible to the actual intentions of the parties in such cases." As the Dean's definition of accommodation paper includes paper for value received, his new illustration has no meaning, if the illustration makes "B" an accommodation indorser.

65-4. The Dean claims the doctrine quoted in the answer from his Leading Cases, that an indorsee without recourse is liable to subsequent holders on his warranty of genuineness, was "a youthful indiscretion" committed in his "callow days," and adds that neither now nor then did he ever entertain the heresy that there was any difference between the obligation of a qualified indorser and that of a transferor by delivery. In addition to former quotations from Daniel and Norton on this subject we beg to refer him to the following quotation from the very able article on Bills and Notes in the 4th American and English Encyclopedia of Law, 2d edition, page 281:—

"Indorsement considered as a transfer of title. (1) Generally. The liabilities of an indorser as a vendor or transferor of the instrument are identical with those of a transferor by delivery, with this exception, that while a transferor by delivery is liable only to his immediate transferee, an indorser, being a party to the instrument, is liable to all subsequent bona-fide holders."[1]

As both this article and the code were published simultaneously, neither could have borrowed from the other. The critic has no need to blush for a "youthful indiscretion" adopted by four of the best American authorities.

Sections 70 and 119-4 add nothing to what have already been discussed. Reiteration does not advance the argument.

Section 120-3 declares that a person secondarily liable on the instrument is discharged by the discharge of a prior party. The critic's arbitrary reply to the answer in regard to this section almost eclipses his remarks on section 29. It had been said in answer to the Dean's strictures on section 120-3 that the context clearly showed that his rendering was a misinterpretation of

[1] To the same effect is Tiedeman, section 244, note 5; Norton, 167.

the meaning of that section, that none of the learned authors who have discussed the Negotiable Instruments Act since it was enacted interpreted it as he did, that the commissioners from thirty-two states whose special duty it was, in reporting the Negotiable Instruments Law for adoption, to mention every change, never suggested any change from the existing law in that section, that it was the language generally given in the text-books,[1] and that the ordinary rule of construction of codes reaffirming the common law was never to assume any change unless imperatively demanded by the language used. The only reply to all these points made in the answer is that the Dean entertains a different opinion. Why he should do so he does not inform us, except by reference to the Vagliano case.

To be sure the Vagliano case refused to add the words "to the knowledge of the acceptor" to the section of the English Act relating to fictitious payees; but why? Because, as the court says in the case of Shipman *et al. v.* Bank of the State of New York,[2] it is apparent the code "intended to make the change and did make the change," but with such extreme reluctance and dissent as to strengthen rather than weaken the doctrine we had cited in Sutherland and Endlich, that in codes restating the common law, "no change is presumed except by the clearest and most imperative implication." In point of fact the Dean practically seeks to read into this subsection (120–3) the words "by operation of law."

The Dean further claims this paragraph, when interpreted as everybody else interprets it, as meaning "a discharge by the holder," could apply to "no possible case." Then what "possible" harm could it do, except in releasing that extraordinary accommodation indorser, always in reserve, who haply indorsed it "for value received"?

Section 186. But the most truly academical criticism in the whole list is the objection to section 186. The section reads thus: —

> "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Copied from the English Act, repeated in the text-books since the first edition of Byles on Bills, with no reported case to the

[1] Norton, 260 and 308.

[2] 126 N. Y. 318, 335.

contrary, this section, at least, would seem to be solid. But, no! In section 89, treating of notice of dishonor generally, the Dean detects a hidden danger, and insists that under the combined operation of the two sections, the drawer of a check would escape liability if no notice of dishonor were given. To be sure, section 89 also is in the English Act and in all the text-books, but what of that? Section 186, the critic says, taken with section 89, establishes a rule "opposed alike to justice and to well established law." How or why the joint effect of the same two statements of law should be one thing at the common law or the law merchant and totally and mischievously different when put in a code, does not appear. If what the Dean means is that section 186 is orthodox enough, but that section 89 is not sufficiently guarded by its own expression and by sections 70, 114, 185, and other kindred sections (as I believe it is), that raises another very different question not heretofore discussed. Although both the English and American acts define checks to be bills of exchange for the sake of convenience, in point of fact this is not strictly true.[1] And the courts, doubtless, in construing the Negotiable Instruments Act, would recognize the distinction between the two, and construe section 89 accordingly, with reference to the ordinary law on demand paper and checks, and practically hold the drawer primarily liable, as he is, in fact, the principal debtor. But however that may be, instead of section 186 aiding the supposed unjust effect of section 89, in discharging the drawer of a check if notice of non-payment is not given, its effect is exactly contrary to that.

For, since the only penalty for delay in presentment (186) is the loss occasioned by delay, and *not* a discharge, the natural inference therefrom would be that the same exceptional exemption as to checks would continue in case of non-payment, namely, that the only penalty would be the loss occasioned by the delay, and *not* any absolute discharge, as claimed by the Dean. It is sufficient here to add, in regard to both sections 186 and 89, that they have been fairly tried and worked well together.

Considering the enormous business in checks every day, the fact that in twenty years' experience in England and four years in four states in the Union, no impecunious drawer of checks

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[1] See 5th Am. & Eng. Enc. of Law, page 1030 and note 2; Norton, page 408, sec. 151

has ever been crafty enough to claim a discharge of his obligation in this ingenious way would seem of itself to refute the strained construction of the Dean. But if a right of action was lost on the check by the effect of the combined sections, the drawer would be liable on the original debt.[1]

APPENDIX.

Letter of Mr. Arthur Cohen, Q. C., on the Negotiable Instruments Law.[2]

5 Paper Buildings, Temple, London,
March 11, 1901.

Dear Sir, — The following are some observations which occur to me in reference to some of Professor Ames's very ingenious and able criticisms of the Negotiable Instruments Act in the "Harvard Law Review."

First, Section 3 provides that an order or a promise is not rendered conditional by the addition of a statement of the transaction which gives rise to the instrument. These words were inserted in the English Act in order to provide for cases where the bill or note contains an order or a promise to pay a certain sum "being a portion of a value or order (*sic*) deposited in security for the payment hereof," or "on account of money advanced for a certain person," and similar cases in which the transaction on account of which the bill or note is given is referred to. Such cases presented themselves in 7 T. R. 733, L. R. 3 Q. B. 753, and other reported decisions. The words in the English Act correctly state what the English law is, and I see nothing obscure, inartistic, or useless in them, nor do I think that any intelligent judge could be misled by them.

As regards section 36–2–3, I do not think that the words used could possibly mislead or present the slightest difficulty to any intelligent person, and as it is by no means easy to determine in what cases an agent is or is not a trustee in the proper sense of the word, I am of opinion that the section ought not to be altered.

Section 9–3 declares "an instrument to be payable to bearer when it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable."* The section is substantially the same as the corresponding one in the

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[1] 2 Randolph, 1554; 2 Daniel, sec. 1120; Van Schaack on Checks, 164, who says "the holder is agent of the drawer," and on page 25 "the drawer is the principal debtor"; Tiffany's Norton, 418, which cites on this point, among many other cases Bull *v.* Bank, 123 U. S. 105.

[2] This letter was received after the above article went to press.

English Act with the exception of the words between asterisks. In Vagliano *v.* Bank of England, 23 Q. B. D. 260, Lord Justice Bowen says: —

"The exception that bills drawn to the order of a fictitious or non-existing person might be treated as payable to bearer was based upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or non-existence of the supposed payee."

The English Act has modified and simplified the law, but the Negotiable Instruments Act has not gone so far as the English Act. I do not think that the section in question will work any injustice, or that there is any sufficient ground for altering it.

Section 9–5. This section is substantially the same as 3 of the English Act. We altered the English law as it stood before the passage of the act. This was deliberately done on the strong recommendation of the bankers and merchants who were members of the committee, and I have reason to believe that the alteration of the law has been generally approved of in the United Kingdom, and there does not seem to have been any opposition to it manifested in the United States.

Section 20. This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in Collen *v.* Wright has often been doubted. Professor Ames takes one case, that of the supposed principal being a bankrupt. Even in that case it would be doubtful what could be recovered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could properly be recovered from the principal. It may well be held that in actions on negotiable instruments, against a person who professedly acts on behalf of another person, A, it would be inconvenient to allow the former to allege an attempt to prove that probably the whole amount could not be recovered from A. I think the 20th section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority.

As regards section 22, it expresses what Mr. Justice Mellor stated as reported in the 8th of Best & Smith, page 833. I think the section objected to is equivalent to the corresponding section of the English Act. The infant cannot be sued, but he can transfer the instrument so as to enable a holder to sue other persons. Professor Ames seems to think it unjust that persons should be able to *retain the negotiable instrument* against the infant. I do not see the injustice of this if the infant himself cannot be sued on the instru-

ment. Again, I do not think any intelligent judge could be misled by the wording of this section.

Section 29. This is the same as the 28th section of the English Act, which has given rise to no doubt or difficulty. "Without receiving any value therefor" means without receiving any value for the bill, and not *without receiving any consideration for lending his name.*

Section 68. This section does alter the law, at any rate as it exists in this country. To me it seems very doubtful whether it is not an improvement by reason of its sweeping away certain technicalities. There has always been a tendency in the law merchant to consider contracts which are in form joint contracts as being intended to be joint and several.

Section 137. I am of opinion with Professor Ames that this section is imperfect. It would seem to imply that if the bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This is not in my opinion the law, and ought not to be law.

I do not think the act is imperfect because it does not contain rules relating to the conflict of laws, any more than it could be considered imperfect because it does not contain rules defining illegality or fraud. The sections in the English Act relating to the conflict of laws were introduced in order to embody the result of certain recent English decisions. I do not know whether the American decisions relating to these questions are sufficiently uniform to render it desirable to embody these results in a code relating to negotiable instruments.

On the whole, I consider the Negotiable Instruments Act a very important and ably framed code. Its style and language seem to me in some respects better than those of the English Act, as being simpler, less technical, and more easily intelligible. I have no doubt it is not perfect. What code is perfect? Whether the very few blemishes which may have been discovered are such as ought to induce states which have not yet adopted the act to require it to be amended, in a few respects, is a question of expediency and public or state policy on which I do not venture to express an opinion.

I am very sorry I have not had time to write more or to put my observations into a better shape.

We are, you may be interested to know, engaged in codifying the law of insurance, and I think the bill will be found to be a useful measure.

Believe me, yours very sincerely,

ARTHUR COHEN.

SUPPLEMENTARY NOTE.

BY JAMES BARR AMES.

Two recent decisions suggest the need of amending two sections of the Negotiable Instruments Law, not considered in the preceding articles reprinted from the "Harvard Law Review."

In Tolman *v.* American Bank,[1] one Louis Potter, representing himself to be Ernest Haskell, induced Tolman to give him his check upon the American Bank, payable to Haskell. Potter indorsed this check in Haskell's name, and the indorsee collected it from the drawee bank. The bank, it was decided by the Supreme Court of Rhode Island, could not debit Tolman, the drawer, with this payment, but must bear the loss due to Potter's fraudulent impersonation.

The Court based this decision upon common law principles and also upon Section 23 of the new Code. The decision is a surprising one in either aspect. Not one of the common law cases cited in its support is in point. On the other hand, all the reported cases on the point of fraudulent impersonation are against the decision.[2] As a statutory question, but for this decision, the liability of the drawer would seem clear under the last clause of the section. He expected that the physical person before him, to whom he delivered the check, would indorse it, as he did. Is he not, therefore, by his conduct, "precluded from setting up forgery or want of authority"? But the opinion was delivered by the learned Chief Justice Stiness, one of the most influential of the Commissioners who framed the Negotiable Instruments Law. It is difficult to believe that the courts which decided the cases opposed to Tolman *v.* American Bank will agree with the view of the Rhode Island Court, that those cases are nullified by Section 23 of the new Code.[3] But this section, in the light of the only judicial interpretation it has received, unless amended, must be a source of mischievous uncertainty.

In Jeffrey *v.* Rosenfeld,[4] a note secured by a mortgage was altered, but by whom did not appear. It is a long-established doctrine in

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[1] 48 Atl. R. 480.

[2] U. S. *v.* Nat. Bank, 45 Fed. R. 163; Meridian Bank *v.* First Bank, 7 Ind. App. 322; Meyer *v.* Indiana Bank (Ind. App. 1901), 61 N. E. Rep. 596; Maloney *v.* Clark, 6 Kan. 82; Emporia Bank *v.* Shotwell, 35 Kan. 360; Robertson *v.* Coleman, 141 Mass. 231; First Bank *v.* American Bank, 49 N. Y. App. Div. 349; Merch. Bank *v.* Metropolitan Bank, 7 Daly, 137; Elliot *v.* Smitherman, 2 Dev. & B. 338; Forbes *v.* Espy, 21 Oh. St. 474; Land Co. *v.* N. W. Bank, 196 Pa. 230. See also Hoge *v.* First Bank, 18 Ind. App. 501; Metzger *v.* Franklin Bank, 119 Ind. 359.

[3] If those decisions are nullified by the new Code, the similar decisions in regard to the sale of chattels (Edmunds *v.* Merch. Co., 135 Mass. 283) remain intact. This certainly would be a singular antinomy.

[4] 61 N. E. R. 49.

England that a material alteration of a note, though made by a stranger, avoids it. This doctrine is perpetuated in Section 64 (1) of the English Bills of Exchange Act. In this country the English rule was not followed. The holder's rights were not impaired by an alteration by a stranger. But Section 124 of the Negotiable Instruments Law relating to "alteration" is almost a verbatim copy of the English act. We are then in this dilemma, — either the English and American sections, although expressed in the same terms, must be interpreted differently, or else the American law is changed, and, as it seems to the writer, for the worse. To avoid the second horn of the dilemma involves a great straining, not to say perversion, of simple English words. The Supreme Court of Massachusetts found it possible to sustain the holder's right to foreclose his mortgage without interpreting this section of the new Code, but remarked that the question of its interpretation was one that deserved serious consideration. There seems to be no good reason why, for the sake of uniformity, a state which has not yet adopted the Negotiable Instruments Law should deliberately introduce the difficulties sure to arise from this section and Section 23.

JAMES BARR AMES.

REPLY TO SUPPLEMENTARY NOTE.

BY LYMAN DENISON BREWSTER.

TOLMAN *v.* American Bank. The exact point in Tolman *v.* Bank was simply this: Was it "precluding" negligence for Tolman to trust the stranger Potter with no further inquiry than that stated in the opinion? On this precise point as to a "stranger payee" there are but two exact precedents.[1] The first is Nat'l Bank *v.* Nolting.[2] This case holds the bank liable, saying "to hold that giving a check to a stranger . . . was sufficient . . . evidence to excuse the bank . . . would be to relieve the bank from a just responsibility." The second case is Smith *v.* Mech. Bank.[3] This case by a divided court held the bank not liable.[4] The theory of the Dean as to the drawer's expectation that the "physical person before him" would indorse the note had already been shown to be a fallacy. The real intent is that the payee named shall be the actual payee.[5] The robust com-

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1 5 Am. & Eng. Enc. of Law, 2d ed., 1066.

2 94 Va. 263; 26 S. E. 326.

3 6 La. Ann. 610.

4 See criticism on this case, 2 Morse on Banking, 2d ed., sec. 474.

5 Note in 50 L. R. A., to Land Co. *v.* Bank, 83; article on "Loss by Check delivered to Impostor," Case & Comment, vol. 7, No. 7, Dec. 1900, page 75.

mon sense of Judge Stiness's opinion on this "intention" point ought to make further discussion thereon needless. And this, too, whatever question there may be as to the correctness of his conclusion in regard to the common law precedents on the general question of fraudulent impersonation. As the Louisiana and Virginia cases above cited put their decisions on the facts attending the giving the checks to a stranger, the question of negligence in such cases would seem to be considered by the courts largely a question of fact. Such being evidently the rule, one would say it was hardly within the province of a short code to provide in detail as to what particular acts of negligence should preclude the drawer from setting up "forgery" or "want of authority" as to a signature, or any negligence by which the fraud was facilitated by his own action. As both the Judge and the Dean agree that the Code does not change the true common law, whatever that may be, the Code on this matter would seem to be about right after all, and to specialize as much as the nature of the case permits.

Jeffrey *v.* Rosenfeld. Section 124 changes both the English and the American law in both clauses, since the second clause affects the first fundamentally. Mr. Tiffany, in his new edition of Norton,[1] says of section 124 that under the second clause "alteration has ceased to be a defense." Perhaps he should have said "practically ceased to be a defense." Why then is the old rule of the common law in England as to the note itself — not the debt — regarding alterations by a stranger as now modified by clause 2 not the best rule between the parties themselves? It makes the law of the two countries uniform on this important point, and like the Statute of Frauds preserves the benefit of written evidence. The Dean gives no reason to the contrary. Such was Mr. Crawford's view as given to the Conference in 1896 and approved by it. That is, he held with the Dean contrary to the *dictum* intimated by Judge Morton, that the American rule was so far changed by the Code. As the Dean says, to hold otherwise would indeed "be a perversion of simple English words." As this appears to be the first case so far in which any judge has suggested any ambiguity in the Code, and this in an *obiter dictum*, and Dean Ames says there is no ambiguity, the Code seems to have fared well on that score. It seems to me, therefore, the critic has shown no sufficient reasons why either section 23 or section 124 should be changed.

I beg to add in regard to the exceedingly few decisions on the Negotiable Instruments Act two cases well worthy of the attention of any student of the subject, Wirt *v.* Stubblefield [2] and Andrews *v.* Robertson.[3] As I read them, both hold to the construction hitherto

[1] Page 248.

[2] 17 Appeal Cases, Dist. of Col. 283.

[3] Wis. 87 N. W. 191.

insisted on in the articles previous to this. That method of interpretation of itself practically disposes of all the serious questions raised by the critic.

Nevertheless, lest the " shadow of a great name " should cause any legislature to delay the adoption of the Negotiable Instruments Law, I venture to add that since the four previous articles have appeared and after a very careful study of them the judiciary committee of the Pennsylvania legislature thought it inadvisable to change a word of the act, and the legislature passed the law without any change whatever after a very thorough discussion of all the points raised by Dean Ames, including the case of Jeffrey *v.* Rosenfeld.

The same conclusion was arrived at by the American Bankers' Association. Judge Chalmers, author of the English act, after going over the whole discussion, while highly extolling the infinite ingenuity of the critic, regarded none of his serious contentions tenable. As to its practical reception wherever adopted, Mr. Tracy, chairman of the Committee on Uniform Laws of the American Bankers' Association, says: " The Negotiable Instruments Law has worked satisfactorily to all classes of business men."

LYMAN DENISON BREWSTER.

THE NEGOTIABLE INSTRUMENTS LAW.[1]

A Review of the Ames-Brewster Controversy.

BY CHARLES L. McKEEHAN.

The Negotiable Instruments Law has now been adopted by twenty states [2] as well as for the District of Columbia, and there is little doubt that in a very few years, at the longest, it will be the law throughout this country. Aside from the importance of the subject with which it deals, the act claims a peculiar interest as being the first important step taken in this country towards codifying any branch of the law. In 1878 Judge Chalmers published his digest of the law relating to bills of exchange, in the preparation of which he read through all the English cases (some twenty-five hundred in number) beginning with the first reported case in 1603. Where there was a dearth of English authority, he states that he had recourse to the American decisions and to the usages among bankers and merchants. Two years after the publication of the digest, the Institute of Bankers and the Associated Chambers of Commerce instructed him to prepare a bill on the subject. This he did, his aim being, to use his own words, "to reproduce, as exactly as possible, the existing law, whether it seemed good, bad, or indifferent in its effects." The bill was introduced into Parliament in 1881, and after a few amendments had been made by the Select Committee of merchants, bankers, and lawyers, to which it was referred by the House of Commons, and by the Select Committee headed by Lord Bramwell, to which it was referred by the House of Lords, it passed both houses without opposition. It is worth noticing that amendments were inserted only when the Committee was unanimous in their favor, no amendments being pressed on which there was a difference of opinion. Practically, the English bill was an enactment into law of Judge Chalmers' digest. For the most part the propositions of the act were taken word for word from the propositions of the digest, and excepting a few amendments which

[1] Reprinted by permission from 41 American Law Register, N. S. 437, 499, 561, with a few changes and additions subsequently made by Mr. McKeehan.

[2] Arizona, Connecticut, Colorado, Florida, Iowa, Maryland, Massachusetts, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin.

were inserted to choose between conflicting decisions, or to correct some admittedly serious errors in the law, the whole purpose of the English Bills of Exchange Act was to reproduce, as exactly as possible, the existing law. This act has now been in force in Great Britain for twenty years, and has been adopted by all of her self-governing colonies. English merchants, bankers, and lawyers appear to unite in the opinion that it has been successful even beyond expectation.

At the Annual Conference of the Commissioners on Uniform State Laws, held in Detroit in 1895, a resolution was passed requesting the Committee on Commercial Law to procure, as soon as practicable, a draft of a bill relating to commercial paper based upon the English Bills of Exchange Act and upon such sources of information as the Committee might deem proper to consult. The matter was referred to a sub-committee consisting of Judge Lyman D. Brewster, of Connecticut; Henry C. Willcox, of New York, and Frank Bergen, of New Jersey, who secured Mr. John J. Crawford, of the New York bar, a well-known expert on the law of bills and notes, to draft the proposed bill.

The English act had followed the continental codes as to form, *i. e.* it dealt primarily with bills of exchange, and then applied those provisions, so far as they were applicable, to promissory notes, adding provisions which were peculiar to the latter class of instruments. Deeming this form to be unsuited to American conditions — the use of bills of exchange being proportionately less extensive here than in Europe — Mr. Crawford adopted a form of his own, which grouped together the provisions applicable to all kinds of negotiable instruments, and then collected, under separate articles, the provisions specially affecting the different classes.

Mr. Crawford's draft was laid before the sub-committee, each section being annotated with reference to the decisions of the Courts, the comments of text-book writers, and the statute laws of the several states. This draft (slightly amended by the sub-committee) and the draftsman's notes were printed along with the English bill for comparison, and copies were sent to each member of the Conference, to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was then submitted to the Conference at Saratoga in 1896. The twenty-seven Commissioners who were in attendance — representing fourteen different states — went over it section by section, and made some amend-

ments to it, "most of which," says Mr. Crawford, "were such changes in the existing law as I had not felt at liberty to incorporate into the original draft." [1] The draft as thus amended was adopted by the Conference, and in such form has been submitted to the various state Legislatures.

The most important contribution that has been made to the act is the Ames-Brewster controversy. In the Fourteenth Harvard Law Review, Professor James Barr Ames, Dean of the Harvard Law Faculty, for some years lecturer on Bills and Notes in the Harvard Law School, and the author of the leading case book on the subject, published an article criticising some twenty-three sections of the new act, and expressing the opinion that notwithstanding the act's many merits, "its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility." Professor Ames' criticisms were answered by Judge Lyman D. Brewster, President of the National Conference on Uniform State Laws, and a member of the sub-committee which drafted the act. The discussion consists of two articles in the Harvard Law Review, by Professor Ames,[2] and two articles by Judge Brewster, one published in the Yale Law Journal and one in the Harvard Law Review.[3] In a pamphlet recently published by the Harvard Law Review Publishing Association, containing the text of the act, together with these articles, there are added a supplementary note by Professor Ames criticising two additional sections of the act — a reply thereto by Judge Brewster, and a letter containing comments on some points of the discussion by Mr. Arthur Cohen, Q. C., a member of the committee which framed the English act, who was recommended by Judge Chalmers as one of the three best authorities in England on the law of bills and notes.

As Judge Brewster remarks, "No keener weapon than that wielded by the accomplished Dean of the Harvard Law School could be turned against the Negotiable Instruments Law." Professor Ames knows more about the law of bills and notes from the student's standpoint than any one else in this country. Whatever one's conclusions may be as to the soundness of his criticisms, there is little doubt that few, if any, of the vulnerable points in the act have escaped his notice, and that the sections he criticises are

[1] Crawford's An. N. I. L. Preface.

[2] 14 Harvard Law Review 241; 14 Harvard Law Review 442.

[3] 10 Yale Law Journal 84; 15 Harvard Law Review 26.

those most likely to come up for construction. A familiarity with his criticisms and with Judge Brewster's replies cannot but aid both the bench and bar in giving some sections of the act their proper meaning. This consideration, together with the difficulty of understanding the discussion in its present form, where the criticism of each section, the answer, replication, and rejoinder are spread out through four separate articles, has prompted me to write a review of the controversy.

Two general observations may be made, which should be borne in mind throughout the entire discussion. In the first place, no one can judge the new act fairly who does not realize that the Commissioners were attempting to *codify* the law.[1] Their aim was not to reform the law of negotiable paper. It was to state accurately and concisely the existing law. Of course, here and there it was necessary to choose between two or more conflicting views. Very frequently a section changes the law in a small minority of states which had departed from the almost uniform current of authority. Occasionally, though very rarely and only when there seemed to be no room for a difference of opinion, the law was deliberately changed. But the main, and almost the sole purpose of the framers of the Negotiable Instruments Law was to reproduce, as exactly as possible, that which the great weight of authority had declared to be the law.

Second, in construing some sections of the act, the language used must be given not a hyper-literal meaning, but a reasonable legal meaning, derived, to some extent, from a knowledge of the cases on which the sections are based. It would be a great achievement for a code to state the law, in every instance, in language capable of meaning only one thing, even to a man entirely without legal training and unacquainted with what the law was before the code. But it will be a long time before such a code is framed. Of course, in the great majority of instances the Negotiable Instruments Law does this. But it is not a serious reflection on the act

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[1] The discussion between Professor Ames and Judge Brewster makes no attempt to take up the broad question as to the propriety and utility of codification. For a most learned and able argument against codification, the reader may be referred to a book by R. F. Clarke, Esq., of the New York bar, entitled "The Science of Law, and Law Making." The arguments in favor of at least a partial codification of such a branch of the law as that relating to commercial paper are concisely stated by Judge Brewster in a paper read before the American Bar Association in 1898 on "Uniform State Laws," which is reprinted in the report of the Ninth Conference of the Commissioners for Promoting Uniformity of Legislation in the United States.

that in some instances a familiarity with the cases on which the language of the act is based, is — if not necessary — at least very helpful in deciding what the language means. Indeed, Judge Brewster said to the American Bar Association, in discussing the new act in 1898, "Care has been taken to preserve, as far as possible, the use of words which have had repeated construction by the courts, and have become recognized terms in the law merchant."

With these observations we may proceed to consider the discussion of particular sections.

Section 3, par. 2: —

> "An unqualified order or promise to pay is unconditional within the meaning of this act though coupled with a *statement of the transaction which gives rise to the instrument.*"

"What," asks Professor Ames, "do these words mean? Do they cover the case of a note coupled with the words 'given as collateral security for A.'s debt to the payee'? Such an interpretation, although a literal one, would be deplorable and would nullify several decisions."[1] It would, indeed, be deplorable, for such notes are clearly conditional and courts have uniformly refused to regard them as negotiable.

Judge Brewster's answer is that this clause does not apply to the case put since "a note 'given as collateral security' contains notice, upon its face, that the note is not an unconditional promise to pay, but conditional upon the non-payment of the principal debt." And he refers to Section 1, par. 2, which requires a negotiable instrument to contain "an unconditional promise or order to pay a sum certain in money." There is no danger that any court will ever make the innovation that would result from the "deplorable interpretation," indicated by Professor Ames. Nor could such a conclusion easily be reached from the language of the act. Without turning back to the first section, the very clause under discussion speaks only of "an *unqualified* order or promise." If "the statement of the transaction" contains a qualification of the order or promise, if it shows that the instrument is not payable at all events, but only on a contingency, the instrument can scarcely be said to contain "an unqualified order or promise." A fair and

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[1] Robbins *v.* May, 11 A. & E. 213; Haskell *v.* Lambert, 16 Gray 592; Costelo *v.* Crowell, 127 Mass. 293; 134 Mass. 280, 285; American Bank *v.* Sprague, 14 R. I. 410 Hall *v.* Merrick, 40 Up. Can. Q. B. 566.

reasonable reading of the section would scarcely require even the most literal interpreter to hold that this clause covers a note given as collateral. To do so, he would have to construe it as meaning, "a note is unconditional provided you start it with an unqualified promise, no matter how many qualifications and conditions are later embodied in the statement of the transaction which gave rise to the instrument." Such an interpretation would be far-fetched, not literal.

But Professor Ames makes another criticism of this clause of Section 3, which is less easily disposed of. The real purpose of this clause, as we learn from Mr. Crawford,[1] who drafted the act, and from Judge Brewster, is to cover the case of a note which contains a statement that it is given for a chattel, which is to be the property of the owner of the note until the note is paid. Such notes are usually regarded as negotiable.[2] Several states, however, have taken the opposite view, holding that such notes are non-negotiable,[3] and it was to bring the latter states into accord with the more general view and unify the law on this point, that this clause was inserted. But will it accomplish this object? That is Professor Ames' further criticism. The only case touching the point is of little or no assistance,[4] but it may seriously be doubted whether this clause will overrule the decisions at which it was aimed. It does not cover a note "given as collateral security" because such a note "contains notice, upon its face, that the note is not an unconditional promise to pay." Suppose a judge decides that a chattel note (one containing a statement that it is given for a chattel which

[1] Crawford. An. N. I. L. 12.

[2] Chicago Co. *v.* Merch. Bank, 136 U. S. 268; Howard *v.* Simpkins, 69 Ga. 773; Choate *v.* Stevens, 116 Mich. 28; Heard *v.* Dubuque Bank, 8 Neb. 10; Mott *v.* Havana Bank, 22 Hun 354; National Bank of Royersford *v.* Davis. 6 Montg. Co. (Pa.) 99; Kimball *v.* Mellon, 80 Wis. 133.

[3] Sloan *v.* McCarty, 134 Mass. 245; South Bend Co. *v.* Paddock, 37 Kan. 510; Third Nat. Bank *v.* Armstrong, 25 Minn. 530; Deering *v.* Thorn, 29 Minn. 120.

[4] Third Bank *v.* Spring, 28 N. Y. Misc. Rep. 9. White, J., held that a note, containing a statement that it is given for a piano, the title of which shall remain in the payee until the note is paid, is not a negotiable instrument. After so holding, he simply remarks that Section 3, par 2, of the Negotiable Instruments Law "has no application here." This decision was reversed in 50 N. Y. App. Div. 66, the court making no allusion to the statute, but merely holding with the current of authority that such a note is negotiable. Judge Brewster points out that the note in this case was made in 1896 and negotiated in May, 1897, but that the New York Negotiable Instruments Law did not become operative until October, 1897, and, therefore, as Judge White said, had no application to the case. Whether Judge White meant that the act did not apply because it was not yet operative, or because the note under discussion was not covered by the section referred to, does not appear.

is to remain the property of the payee until the note is paid) is not an unconditional promise to pay. Would he feel that this clause covers such an instrument? And at least some of the courts which hold chattel notes non-negotiable do so on precisely this ground. Sloan *v.* McCarty.[1] By the instrument sued upon in that case, the defendant promised to pay Sloan, one month from date, $85, for a roan horse known as A. M., "said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." The court said this note contained a conditional promise and so was non-negotiable. "If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale and the defendant would then have no right to the horse, and would no longer be liable to pay the note. . . . If the horse should die within the month without fault on the part of the defendant, the plaintiff would be disabled from transferring the title and could not maintain an action on the contract."[2] Now, if Section 3, par. 2, does not cover a note "given as collateral security" for the very reason that such a note shows on its face that the promise contained in it is conditional, why will it cover a "chattel note" in jurisdictions which say that a chattel note shows on its face that the promise contained in it is conditional? That is Professor Ames' second criticism, to which no answer seems to be furnished in Judge Brewster's replies.

Professor Ames' conclusion is that Section 3, par. 2, is "either useless or provocative of litigation."

If, by "useless" is meant that it will fail to overrule the cases which hold chattel notes non-negotiable on the ground that they are conditional promises, this subsection may prove to be useless. Aside from this, however, it may not have been unwise to insert it in the act. The clause is copied almost word for word from Section 3, par. 3, of the English act,[3] which was inserted to codify the

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[1] 134 Mass. 245 (1883).

[2] The Minnesota courts give the same reason for their decision as those of Mass Third Nat. Bank *v.* Armstrong, 25 Minn. 530.

But the Kansas courts (also instanced by Professor Ames) hold chattel notes to be non-negotiable, not so much on the ground that they are *conditional*, as that they contain stipulations other than the promise to pay money. Killan *v.* Schoeps, 26 Kan. 310 Pg. 312; South Bend Co. *v.* Paddock, 37 Kan. 510. Should Kansas adopt the act, her courts might, therefore, hold that the section under discussion changed the above cases.

[3] English Bills of Exchange Act (August 18, 1882), 45 and 46 Vict. C. 61. Sec. 3-3: "An unqualified order to pay coupled with a statement of the transaction which gives rise to the bill, is unconditional." And by Sec. 89 the above clause applies to promissory notes.

decisions of cases[1] in which the instruments sued on contained language which, while absolutely unnecessary to a negotiable instrument, nevertheless did not qualify the promise in any way, nor contain any independent promise, but amounted to nothing more than a brief description of how the instrument came to be drawn — a statement of the consideration for which it was given — a memorandum that collateral security for the note had been given — an indication of the nature of the transaction. The courts held that such language did not affect the negotiable character of the instrument. Referring to this subsection, Mr. Arthur Cohen says: "The words in the English act correctly state what the English law is." The courts of this country do not differ on this point from those of England. They have held almost unanimously that language such as that used in the English cases referred to does not destroy the negotiable character of a bill or note.[2] Section 3, par. 2, of the new act will doubtless be regarded here as it has been for twenty years in England, as a codification of this rule of law, and as such may serve a useful purpose.

Whether the clause will be provocative of litigation remains to be seen. It has not given rise to a single case in England, where it has been in force for twenty years, nor has any case arisen under it as yet in this country. It will quite likely come up for construction in the very few jurisdictions which have hitherto held chattel notes non-negotiable, but it is extremely unlikely that any lawyer will ever attempt to have it applied to notes "given as collateral security." Therefore, about the worst that can be said against it is that it may not accomplish quite all that its framers intended.

Section 9, par. 3: —

> "The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

Professor Ames levels two criticisms at this subsection. In the first place, he says that such a rule "ignores the tenor of the instrument," meaning, for one thing, that to say an instrument payable to "John White or order" is payable "to bearer" is to ignore what the instrument itself says — even though no such person

[1] Houssoullier *v.* Hartsinck, 7 Term Rep. 733 (1798); Griffin *v.* Weatherby, L. R. 3 Q. B. 752 (1868).

[2] 4 Am. and Eng. Encyc. of Law, 2d Ed. 89 and cases there cited. 1 Ames' Cases on "Bills and Notes." Note on p. 56. Devenny *v.* League Island Loan and Bldg. Assn., 9 W. N. C. (Pa.) 127; Citizens' Nat. Bank of Towanda *v.* Piolett, 126 Pa. 194.

as John White exists. The correct way to interpret such an instrument, says the critic, is to give it the effect of an instrument payable to the order of and indorsed by the drawer or maker respectively. Thus a bill drawn by Andrew Smith payable "to the order of John White" (a fictitious payee) and indorsed in the name of John White ought to be treated as a bill drawn by Andrew Smith payable to his own order, and by him indorsed — this result being reached by regarding the bill as payable to Andrew Smith by the name of John White.[1] Professor Ames objects to treating any such instrument as payable "to bearer." Undoubtedly there are strong arguments in favor of such a view, and the whole question of fictitious payees might have been simpler and more logical had they originally prevailed. As a matter of fact, however, the act on this point merely codifies that which has been the settled law of England and America for more than a century. The arguments in support of Professor Ames' view were fully presented both to the Court of King's Bench and to the House of Lords in the leading case of Minet *v.* Gibson,[2] decided in 1791. Both courts repudiated them and held that the holder in due course of a bill payable to the order of a fictitious payee could, as against the drawee who accepted knowing that no such person existed, declare on the bill as payable to bearer and recover.[3] Lord Chief Baron Eyre delivered a powerful dissenting opinion. "His reasoning," Professor Ames has said, "has never been refuted."[4] It is equally true that it has never been followed. Minet *v.* Gibson has been practically unanimously followed both by English and American courts.[5] It was followed, moreover, in the English Bills of Exchange Act,[6] and it would have been strange indeed if

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[1] Professor Ames has long insisted that this is the correct way of interpreting such instruments. See Ames' Cases on "Bills and Notes," Vol. 2, Summary, p. 864, published in 1881.

[2] 1 H. Blackstone, 569

[3] Minet *v.* Gibson is universally regarded as the leading case on this point, though there had been several earlier decisions to the same effect. Tatlock *v.* Harris, 3 T. R. 174; Vere *v.* Lewis, 3 T. R. 182; Collis *v.* Emett, Term Rep. C. P. 313.

[4] Ames' Cases on "Bills and Notes," Vol. 1, p. 421.

[5] Gibson *v.* Hunter, 2 H. Bl. 187, 288; 6 Bro. P. C. 235, s. c.; The Royal Bank of Scotland, 19 Ves. 310; Farnsworth *v.* Drake, 11 Ind. 101; Smith *v.* Mechanics' Bank, 6 La. An. 610, 624 (semble); Bartlett *v.* Tucker, 104 Mass. 336, 344 (semble); Rogers *v.* Ware, 2 Neb. 29 (semble); Foster *v.* Shattuck, 2 N. H. 446; Plets *v.* Johnson, 3 Hill 112; Stevens *v.* Strang, 2 Sandf. 138; Forbes *v.* Espy, 21 Oh. St. 474, 483 (semble), Hunter *v.* Blodget, 2 Yeates, 480.

[6] It may aid comparison to print the corresponding sections of the two acts

the framers of the American act, who were *codifying* the law, who were framing a code, moreover, which would have to run the gauntlet of nearly fifty legislatures, had attempted anything so inexpedient as the overthrow of such a well established and universally accepted rule.[1]

The second criticism of subsection 9, par. 3, is that such an instrument is, under the act, payable to bearer *without being indorsed,* and that this, also, ignores the tenor of the instrument. "Nor is there any judicial precedent or mercantile custom," says Professor Ames, "in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation." That is substantially true.[2] If such an instrument requires no indorsement, a departure has been made from what has been supposed to be the law — and Professor Ames and Judge Brewster agree that the new act dispenses with the necessity of an indorsement. Indeed, any other reading of it seems impossible, though whether an indorsement is necessary under the English act has never been decided, and seems fairly open.[3]

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together. English Bills of Exchange Act, Section 7, par. 3: "When the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

The Negotiable Instruments Law, Section 9, par. 3: "The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

[1] The rule was originally based on the doctrine of estoppel. Prior to the English act (1882) a recovery was never allowed except against a defendant who became a party to the bill knowing that the payee was fictitious. See Minet *v.* Gibson, 1 H. Bl. 569, and Review of Cases by Bowen, L. J., pp. 257–260, in Vagliano Bros. *v.* Bank of Eng., L. R. 23 Q. B. D. 243 (1889). The English act, however, rendered the defendant's knowledge immaterial, providing merely that a bill may be treated as payable to bearer when the payee is fictitious. The American act does not go so far, however, for it contains the proviso "and such fact was known to the person making it so payable." But if the maker or drawer knows the fact, then the bill is for all purposes payable to bearer, and thus a drawee, who accepted in ignorance of the fact, would be liable.

[2] In New York, however, it has been held for many years that a bill or note payable to the order of a fictitious payee is payable to bearer without being indorsed by the maker or payee. Plets *v.* Johnson, 3 Hill, 112; Central Bank of Brooklyn *v.* Lang, 1 Bosworth, 203; Irving, N. B. *v.* Alley, 79 N. Y. 536.

[3] It might be argued that the words "may be treated as payable to bearer" used in the English act mean that the bill may be so treated only when regular in all other respects, *i. e.,* among other things, when properly indorsed. Judge Chalmers, the draftsman of the English act, says of this subsection: "When a bill is payable to the order of a fictitious person, it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text-books, the act

Judge Brewster defends the change. He says: "Surely it is more logical to hold that a note which purports to be payable to a person when there is no such person, and the maker knows it, must have been intended to be payable to bearer, than to hold that somebody must assume the name of such fictitious person and make a false indorsement in order to give title to the note." There is much common sense in that. But the trouble is that title to a note payable to order is derived through the indorsement on the back of it. What "must have been intended" by a maker who names a fictitious payee it is extremely hard to say. Moreover, both commercial practice and legal theory tend more and more to disregard everything except that which actually appears on the instrument. When A. makes his note payable to "John White or order" all our notions about negotiable paper require that John White be written on the back of this note, even though no such person as John White exists. It seems necessary for form's sake. To dispense with the necessity for it gives a decided jolt to our ideas. Aside from this, however, it is difficult to see how any harm can result from the change. In the first place (and though this does not touch the theory of the criticism, it does touch its practical worth) notes payable to fictitious payees and unindorsed, will be about as plentiful as counterfeit dollars labelled "counterfeit." Either the maker or the person to whom he delivers the instrument will indorse it in the name of the fictitious payee. Why? Because otherwise no one would discount it. It would be patently irregular on its face. An indorsement is necessary to give such a note *any commercial value*. Professor Ames supposes one case which, in his opinion, works an injustice on the maker. He says, "By the combined effect of this section and section 16[1] if a note payable to a ficti-

puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person but in the hands of another is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bona fide* holder would be justified in indorsing it in the payee's name. It might have been better if the act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer." Chalmers' Bills of Exchange, 5th Edition, page 22. From this, it would appear that the failure of the English act to require an indorsement was a mere oversight — though the use of the words "may be treated" furnishes a method of correcting the omission. Judge Brewster's readiness to defend the change in the American act seems to indicate that the change was intentional. Except for this, one would suppose that it had been an oversight.

[1] Section 16 provides, *inter alia*, "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed."

tious payee were stolen from the maker and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker."

Clearly the maker would be liable in such a case, but is this a "cruel injustice"? If the note were stolen when made expressly payable to bearer or when made payable to a fictitious payee, and then indorsed, there would be no injustice in holding the maker. How much more sympathy is he entitled to when (though not indorsing the note) he deliberately chooses to name a payee, well knowing that there is no such person in existence. If it is merely a question of the actual justice meted out, it takes a nice distinction and a very tender heart to produce much sympathy for the maker in the case supposed. Both parties are innocent of fraud, but it is the maker's conduct that made the fraud possible and he should bear the loss. Even in the rare case where no indorsement whatever appears on the back of the note, no actual injustice is done in holding the maker liable. The real worth of the criticism lies in its technical point, namely, that this subsection permits the transfer, without indorsement, of an instrument which, for all that appears on the face of it, requires an indorsement to make a valid transfer.

It remains to notice one or two other points before passing this subsection.

In his first paper, Judge Brewster seemed to suggest that notes payable to the order of unincorporated associations or to the estates of deceased persons are payable to bearer by force of Section 9, par. 3. Professor Ames performs a real service in disposing of such a notion in vigorous fashion, though the discussion on this point was evidently due to a misunderstanding, as in his second paper, Judge Brewster disclaims holding any such view as that attributed to him. The point, however, is worthy of notice, since both Mr. Crawford and Mr. Selover, in their published Annotations of the act, seem to have gone astray on this point and to seriously regard notes payable to the estate of a deceased person as payable to bearer.[1] Such an interpretation is opposed alike to reason and authority, and should it prevail, much harm might

[1] "Thus a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and, where it has been negotiated by the maker,

result. Moreover, such was not the law prior to the act, and there is absolutely nothing in this subsection which either suggests or warrants such a change.

The meaning of the words "fictitious or non-existing person," used in the corresponding section of the English act, came before the House of Lords in the case of Vagliano Bros. *v.* The Bank of England.[1] The plaintiffs in that case were in the habit of accepting bills drawn on them by "V" (their foreign correspondent) in favor of Petridi & Co., a foreign firm. One Glyka, the plaintiffs' clerk, fraudulently drew a bill in V.'s name on the plaintiffs, payable to Petridi & Company. After the plaintiffs had accepted it, Glyka forged Petridi & Company's name and had the bill cashed by the Bank of England. Of course, Glyka never intended that the bill should be delivered to Petridi & Company or that they should receive any money on it, the whole transaction being a fraud on his part. The question came up whether this was a bill payable to bearer within this subsection of the English act. The House of Lords, reversing the lower court, held that Petridi & Company was a fictitious person within the act and that the bill was therefore payable to bearer, but the opinions delivered in both courts disclose a wide difference of opinion as to the true meaning of the words "fictitious or non-existing person."[2] The possibility of litigation

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is deemed, as against him, to be a note payable to bearer. Lewisohn *v.* Kent, 87 Hun 257." Crawford's Neg. Inst. Law, p. 18.

"When the name of the payee does not purport to be the name of any person, as in the case of instruments payable to an estate, . . . the paper is payable to bearer. Scott *v.* Parker, 5 N. Y. Supp. 753; Lewisohn *v.* Kent, 33 N. Y. Supp. 826." Selover's Neg. Inst. Law, p. 73.

True, there is a dictum to this effect in Lewisohn *v.* Kent, but, as Professor Ames justly says: "It is a perversion of language to call the payee in such a note a fictitious or non-existing person." In Shaw *v.* Smith, 150 Mass. 166, and Peltier *v.* Babillon, 45 Mich. 384, such a note was properly interpreted as a note payable "to the legal representatives of A." As to bills payable to an unincorporated company, Judge Chalmers says: "The signature of a fictitious person must be distinguished from the signature of a real person using a fictitious name, — for instance, John Smith may trade as 'The Birmingham Hardware Company' and sign accordingly. Schultz *v.* Astley (1836), 2 Bing. N. C. 544." Chalmers' Bills of Exchange, 5th Edition, p. 23.

[1] L. R. 23 Q. B. D. 243 (1889) and L. R. 16 Appeal Cases 107 (1891).

[2] The majority in the Lower Court, speaking through Bowen, L. J., held that Petridi & Company were not fictitious payees, inasmuch as they were not known to be such by the party sought to be charged, *i. e.*, the acceptor. "By the words 'The bill may be treated as payable to bearer' must surely be understood 'treated as against those who are to be made liable for the bill.' The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. . . . If the obligations of the acceptor are in question, and the acceptor is

of the same sort under our act might have been avoided by substituting " when the drawer or maker knowingly makes the instrument payable to the order of *a fictitious or non-existing payee, or a living person not intended to have any interest in it*," [1] though probably the words of the act will prove to be sufficiently precise.

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the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor and to his knowledge." Such an interpretation could scarcely be made under our act, which, instead of saying "may be treated as payable to bearer," says "is payable to bearer," and clearly points out the only person whose knowledge is material, *i. e.*, the person making it so payable.

Lord Bramwell, in a trenchant dissent in the House of Lords, held that Petridi & Company was not a "fictitious or non-existing person" within the meaning of the act, since it was a real, existing firm, "as identifiable as N. W. Rothschild & Company, — Glyn, Mills, Currie & Company, — as the Bank of England itself." On the other hand, Esher, M. R. (dissenting in the Lower Court), thought that "fictitious" must embrace an existing person; for "if 'fictitious' in this subsection does not apply to the name of an existing person, who is not really intended to be the payee, I can see no distinction between 'fictitious' and 'non-existing' in the subsection." Lord Bramwell characterized this argument as "very feeble. . . . A prudent draughtsman does not accurately examine whether a word will be superfluous. He makes sure by using it"

Judge Chalmers says that the words "or non-existing" seem superfluous, and that they probably were intended to cover the case of Ashpitel *v.* Bryan (1863), 32 L. J. Q. B. 91, in which, by arrangement between the indorsee and acceptor, a bill was drawn and indorsed in the name of a deceased person. Chalmers' Bills of Exchange, 5th Edition, pp. 21 and 22.

Halsbury, L. C., held that if the person named in the bill is not the real *payee*, then, although a real *person*, he is "fictitious" within the statute. But Lord Selbourne thought the statute did not extend to the case of a real person falsely represented as payee, because "the Legislature has here described 'a *person*' as 'fictitious or non existing' instead of saying 'when the *payee* is fictitious or non-existing.'"

The majority of the House of Lords held (though for very different reasons) that Petridi & Company were fictitious payees within the meaning of this subsection, and that therefore the bill was payable to bearer.

See also Clutton & Co. *v.* Attenborough, L. R. 2 Q. B., pp. 306 and 707. The plaintiffs' clerk, by fraudulently representing that work had been done for them by one George Brett, induced them to draw checks payable to the order of George Brett in payment of the pretended work. In point of fact, no such person as George Brett existed. The clerk then forged Brett's indorsement and cashed the checks. Held, that Brett was none the less a fictitious or non-existing person within the act, because at the time of drawing the checks the plaintiffs supposed him to be a real person. Therefore these checks were to be treated as payable to bearer. The decision in this case would be different under the American act, which insists that the fictitious character of the payee must be known to the person making the instrument so payable.

[1] The words in italics are practically Professor Ames' suggestion, except that he uses "person" instead of "payee." It is submitted that the latter word would be better. "In truth, if strictly construed, the words 'fictitious person' are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one. But to satisfy the word 'fictitious,' as applicable to a person, is assuming in one part of the proposition what is denied in the other." Per Halsbury, L. C., in Vagliano Bros. *v.* The Bank of England. In addition to this

Finally, it may be noted that the words used in the English act "*may be treated as* payable to bearer" are less fortunate than the wording of our act, which says, "*is* payable to bearer when," etc. Under our act, it is payable to bearer for all purposes just as completely as if it had indeed been expressly so drawn. In England, however, the question may arise, "Who may so treat it?" In Vagliano Bros. *v.* The Bank of England, Lord Bramwell insisted that this subsection was inserted solely for the benefit of the holder, but the majority thought that the bill might be treated as payable to bearer by any person whose rights or liabilities depended upon whether it was a bill payable to order or to bearer.

Section 9, par. 1–5:

> "The instrument is payable to bearer (1) when it is expressed to be so payable; or (5) when the only or last indorsement is an indorsement in blank."

Section 40, which is involved in the discussion of Section 9, par. 1–5, reads:

> "When an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

One or two preliminary observations may aid to a proper understanding of the criticisms made of these sections.

Blank indorsements were unknown to the early law of Bills and Notes, which required that the name of the indorsee should be contained in the indorsement. A practice later arose by which the payee often wrote only his own name on the back of a bill, leaving a blank above his signature for the name of the indorsee. Hence the term "blank indorsement." The bill being transferred in this condition, the transferee or any subsequent holder has an implied authority "to write above the signature an order of payment to himself, or to bearer, or to anyone to whom he may wish in turn to transfer the bill; and the blank indorsement, when so filled up, takes effect by relation from the time of the original delivery by the indorser."[1] The transferee or any subsequent

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rather fine-spun reason, the use of the words "fictitious *person*" presented a real difficulty to Lord Selbourne. See extract from his opinion, cited in the preceding note on Vagliano Bros. *v.* Bank of England.

[1] Ames' Cases on "Bills and Notes," vol. 2, p. 837.

holder is the indorser's agent for this purpose. For a long time it was necessary to exercise this authority and fill out all the blank indorsements on a bill at or before trial. Gradually this last requirement was dispensed with, and thus a bill payable to the order of A. — with A.'s name written on the back (no indorsee being named) could be recovered on by the holder.[1] Such instruments are said to be payable to bearer, and indeed they are so while the indorsement remains blank, but although the *necessity* of filling up a blank indorsement has been dispensed with, the *right* to do so has never been abridged, and the holder of a bill or note has to-day, as he always had, the right to fill up any or all blank indorsements on the instrument and thus make it payable only to order.

It is to be observed — and this is important — that these rules in no way violate the original tenor of the instrument. The maker has promised to pay "A. or order," and A., by signing his name with a blank above it and handing it to B., authorizes B. or any subsequent holder to designate the person entitled to receive payment. Until they do so designate him, the holder is the man entitled. Now, suppose B. indorses specially to C. or order, and then C. transfers the paper to D. by mere delivery. Should D. be allowed to sue the maker as on a note payable to bearer? No, for since the maker has promised only to pay to A.'s order — and since A. has given B. or any holder authority to designate the one to whom the sum shall be paid — and since B. has designated that it shall be paid "to C. or order" — plainly no one who cannot trace title through C. comes within the terms of the maker's promise. That is the logical view, and it is the view that the merchants and bankers adopted, *i. e.*, a blank indorsement of a note payable to order is controlled by the subsequent special indorsement.

But the courts held otherwise. In the case of Smith *v.* Clarke,[2] decided in 1794, a bill originally payable to order, was indorsed in blank by the payee and was subsequently indorsed specially. Lord Kenyon held that the bill was payable to bearer as long as the first

[1] This added a new term to the indorser's order, *i. e.*, that until the blank was filled up the instrument should be payable to bearer.

[2] Peake, 225. Although in a case which arose some years earlier, Ancher *v.* Bank of England, 2 Douglas, p. 637 (1781), Lord Mansfield evidently agreed with the understanding of merchants that a blank indorsement was controlled by a subsequent special indorsement. However, the exact point decided in Smith *v.* Clarke was not involved in that case.

indorsement remained blank, and that the holder might therefore strike out the special indorsement and recover as on a bill payable to bearer. Smith *v.* Clarke has been generally followed both in England and America.[1] This decision was opposed to the view held by the business community, and so, in 1882, the framers of the English act, in order "to bring the law into accordance with the mercantile understanding, by making a special indorsement control a previous indorsement in blank,"[2] provided in Section 8, par. 3:

> "A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank."

The provisions of Section 9, par. 1–5, of the American act are the same as those of the English act and were inserted for the same reason.

It is further to be observed that Smith *v.* Clarke and all of the cases which follow it are cases of instruments *originally payable to order*. None of these cases contains a syllable about instruments originally made payable to *bearer*.[3] There is an important distinction between the two kinds of instruments. For reasons which I have referred to above, the custom of merchants, which has now been adopted by both the English and American acts, says that in the case of an instrument originally payable to order, a blank indorsement is controlled by a subsequent special indorsement, because in such a case the maker's promise embraces only those who make title through the special indorsement. But a note *originally payable to bearer* is another matter. It is a violation of the plain tenor of such a note to treat it as other than payable to bearer. That is the maker's absolute promise — to pay the bearer. His promise cannot be qualified or changed in any way by a subsequent holder. The only effect of a special indorsement on such a note is that the *indorser* can be held only by those who make title through his indorsement.[4]

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[1] Walker *v.* MacDonald, 2 Wels Hurl & Gordon, 526 (1848); Houie *v.* Bailey, 16 La. 213 (1840); National Bank *v.* Haskins, 101 Mass. 370 (1869); Houry *v.* Eppinger, 34 Mich. 31 (1876); Watervliet Bank *v.* White, 1 Denio 608 (1845); Pentz *v.* Winterbottom, 5 Denio 51 (1847); French *v.* Barney, 1 Iredell 219 (1840); Mitchell *v.* Fuller, 15 Pa. 268 (1850); Rand *v.* Dovey, 83 Pa. 280 (1877). *Contra:* Myers *v.* Friend, 1 Randolph 12 (1821).

[2] Chalmers' Bills of Exchange, 5th Edition, p. 24.

[3] But see Johnson *v.* Mitchell, 50 Tex. 212. — Ed.

[4] Story, Bills of Exchange, Section 207; Wood's Byles on Bills and Notes, 151.

This distinction between instruments originally payable to bearer and instruments originally payable to order and then indorsed in blank is preserved both in the English and American acts. Under both acts, a note originally payable to bearer and specially indorsed continues payable to bearer, while an instrument originally payable to order is payable to bearer only when the last indorsement is in blank. Professor Ames says that this distinction is "illogical and undesirable," though he gives us no reasons. Judge Brewster's reply is equally brief: "The reason why such a rule is 'illogical and undesirable' is not clear." It is submitted that, for the reasons noted above, this distinction is decidedly "logical," and inasmuch as it appears to obtain generally throughout the business community, its continued observance by the Code would seem to be "desirable."

Professor Ames further criticises this subsection, as follows: "If an instrument indorsed in blank and subsequently indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this subsection, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name." *I. e.*, A. makes a note to B. or order. B. indorses in blank. C. indorses it "to D. or order" and D. delivers it (without indorsement) to E. Professor Ames thinks that E. should have the right to strike out C.'s indorsement and sue A. or B. as on a note payable to bearer.

Why should he have this right? It has long been the law (and still is under Section 48) [1] that the holder may strike out any indorsements which are not necessary to his title. The law has never permitted him to strike out indorsements which are necessary to his title.[2] Now, so long as Lord Kenyon's doctrine [3] prevailed, the holder had the right to strike out all indorsements subsequent to the first blank indorsement because the instrument

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[1] Sec. 48: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him are thereby relieved from liability on the instrument."

[2] Story, Promissory Notes, Section 208.

[3] Smith *v.* Clarke, *supra.*

was by that first blank indorsement payable to bearer and a subsequent special indorsement did not change its tenor and was therefore not necessary to his title. But this subsection was inserted for the express purpose of doing away with Lord Kenyon's doctrine. Everybody agrees that a blank indorsement of an instrument originally payable to order ought to be affected by a subsequent special indorsement. What does this change mean, then? Why it means (taking the case Professor Ames supposes for us) that by virtue of the special indorsement by C. the note has again become payable *only to order,* and therefore C.'s indorsement cannot be stricken out by a subsequent holder *because it is necessary to his title.* Suppose D. had in his turn indorsed specially to E. The latter (though now a *holder* within the meaning of the act) could not strike out the indorsements of C. and D. Why? Because the instrument being now again payable to order only, the indorsements of C. and D. are necessary to his title, and so Section 48 gives him no right to strike them out. Professor Ames says, "As owner of the instrument, he ought to have the right." But ownership of a bill or note gives the holder no right to alter it — to change the tenor of any of the promises which it evidences.

Judge Brewster answers this criticism, however, in another way. He first agrees with Professor Ames that E. (in the case supposed) ought to be allowed to strike out C.'s special indorsement, and then he tries to give him this right.[1] He first points to Section 48, which gives the right to strike out indorsements not necessary to title. But Professor Ames reminds him that Section 48 confers this right only on *holders* and that E. is not a holder, for "holder" is defined in Section 191 to mean "The payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and "bearer" is defined by the same section to mean "The person in possession of a bill or note which is payable to bearer," Both ignore the fact that in the case supposed C.'s indorsement is necessary to E.'s title.

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[1] Mr. Farrell answers Professor Ames as follows: "In answer to this, it is necessary only to say that in most jurisdictions he may bring suit in his own name, being the real party in interest." (The Negotiable Instruments Law, by Jno. Lawrence Farrell. Brief of Phi Delta Phi, Vol. III, No. 2, First Quarter, 1901.) But the statutes which permit an assignee to sue in his own name have effected merely a procedural change. He is still an assignee merely and can be met by any defence arising out of the instrument which could be pleaded against the assignor. The question is not, in whose name shall E. bring suit (a minor point), but it is, what right can E. assert.

In order to give E. the right to sue the maker, Judge Brewster next refers to Section 40, which provides *inter alia* that "when an instrument payable to bearer is endorsed specially, it may nevertheless be further negotiated by delivery."

"This section," says Judge Brewster, "which authorizes a transfer by delivery seems to give the transferee the right to sue in his own name, otherwise the note would not be negotiated within the meaning of the act." But if Section 40 applies to a note originally payable to order — then indorsed in blank and made payable to bearer — and then indorsed specially — if such an instrument may still be negotiated by delivery, then the rule of Smith *v.* Clarke is still in full force, and Section 9, par. 5, which was inserted to overthrow Smith *v.* Clarke, is a nullity. That carries us to the next criticism.

Professor Ames insists that Section 40 completely nullifies Section 9, par. 5, and that for this reason only may E. sue the maker in the case supposed. His position is that Section 9, par. 5, was inserted to change the old rule that an instrument "payable to bearer (or indorsed in blank)"[1] although afterwards specially indorsed, was still negotiable by delivery — that "then, in apparent forgetfulness of the effect of Section 9, par. 5," Section 40 was inserted providing that an instrument payable to bearer and indorsed specially is still negotiable by delivery, the special indorsee being liable only to such as make title through his indorsement, and that this section (40) thus changes the law back to its former state.

Judge Brewster's answer is:

"Section 40 is claimed to be repugnant to Section 9, par. 5, but this is not so. Section 9, par. 5, declares a note to be payable to bearer when its last indorsement is in blank; *40 relates to a note when the last indorsement is special, and provides that it may then be transferred by delivery*,[2] in order to cover cases of good faith where title is frequently passed in that way, by persons ignorant of mercantile usage."

It is submitted that that is no answer, and for this reason. If a bill *may be transferred by delivery*, it is payable to bearer. Section 40, on Judge Brewster's reading, permits a bill whose last

[1] These are Professor Ames' words; but if by "Payable to bearer" he means *originally* payable to bearer, it is submitted that neither Smith *v.* Clarke nor any of the cases which follow it say anything about such instruments. They are all cases of instruments originally payable to order.

[2] The italics are the reviewer's.

indorsement is special to be payable to bearer, yet Section 9, par. 1–5, was inserted to permit only bills originally payable to bearer or whose last indorsement is in blank to be payable to bearer.[1]

I submit that in one way and one way only can these two sections be harmonized. If Section 40 be interpreted as applying only to instruments originally payable to bearer, there can be no difficulty as to either section.[2] True, it reads merely "When an instrument payable to bearer is indorsed specially," etc., and there is no denying that if it meant only an instrument originally payable to bearer it should have said so. At the same time, the words used are commonly understood to describe an instrument originally payable to bearer, and there is the additional reason that unless these words are so interpreted here, the section is diametrically opposed to Section 9, par. 5, a conclusion plainly to be avoided if possible. Again, Section 9, par. 5, can be construed in only one way, while Section 40 may be construed either as being opposed to or as being in harmony with it. Moreover, such an interpretation would be good law. At the opening of the discussion of these sections, some reasons were submitted why the distinction between instruments originally payable to bearer and those originally payable to order and indorsed in blank, was both logical and desirable. However this may be, such a distinction is certainly

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[1] Judge Brewster cites the following passage from the new Norton Horn Book by Mr. Tiffany, p. 116, to prove that Section 40 and Section 9, par. 5, are in harmony: "An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who, on such an indorsement, after such an indorsement, is only liable on his indorsement to such parties as make title through it."

It is submitted that the above tends to prove just the reverse, because if by Section 40 an instrument originally payable to order, then indorsed in blank, and then specially indorsed, is still payable to bearer, Section 9, par. 5 (which intended to make only instruments whose last indorsement is in blank payable to bearer) is nullified.

Mr. Crawford, the draughtsman of the act, actually regards Section 40 as embodying the decision of Smith *v.* Clarke (Crawford's Annotated Negotiable Instruments Law, p. 41). Yet admittedly Section 9, par. 5, was intended to overthrow that decision.

[2] (Supplementary Note. In commenting upon the above suggestion, Professor Ames has pointed out that Section 9–1 includes, not only instruments originally payable to bearer, but also instruments originally payable to order and indorsed by the payee expressly "Pay to bearer." 16 Harvard Law Review, 257. This seems clearly right, and it would seem to show that the writer's suggestion should be modified to this extent, that Section 40 should be construed as applying only to instruments *expressly* payable to bearer, thus including instruments originally so drawn, and also instruments originally drawn to order and then expressly endorsed by the holder "Pay to bearer." With this modification, the writer is still of opinion that the suggested construction of Section 40 would satisfactorily harmonize that section with Section 9–5.)

made in Section 9, par. 5, and it has been made without complaint for twenty years in the English act. The suggested interpretation of Section 40 preserves this and the two sections would be harmonious. By Section 9, par. 1, an instrument originally payable to bearer continues to be payable to bearer even though specially indorsed. But if it is specially indorsed, then by Section 40 "the person indorsing specially is liable as indorser only to such holders as make title through his indorsement," and this has always been the law.[1] By Section 9, par. 5, on the other hand, a bill originally payable to order is payable to bearer only when the only or last indorsement is in blank. Every one of these propositions is good law and accords with the understanding of merchants.

The remaining criticism of this subsection is unimportant. "If it is to be taken as it stands," says Professor Ames, "a note payable by A. to the order of B., and bearing the anomalous blank indorsement of C., would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank."

Profesor Ames does not suggest that any merchant, any lawyer, any court would ever give the section such a construction. Nor does it require any stretch of the English language to arrive at its proper meaning. An anomalous indorser is not strictly an indorser at all. He is called one for convenience' sake, and a liability closely resembling that of an indorser is fastened upon him. But a section which uses the word "indorsement" with reference to the transfer of an instrument, could scarcely be regarded as having any reference whatever to an anomalous indorser. The words used in Section 9, par. 5, of the American act have been found entirely satisfactory in the English act throughout twenty years' experience, and there can be no reasonable doubt as to their meaning with reference to an anomalous blank indorsement.

Section 20:

> "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing the principal, does not exempt him from personal liability."

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[1] Story, Bills of Exchange, Section 207; Wood's Byles on Bills and Notes, p. 151.

Professor Ames criticises this section as follows:

"Section 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument if not duly authorized.[1] This is a departure from the English act and from the almost uniform current of judicial decisions. This new rule involves a flat contradiction of the instrument, and the fiction works not justice, but injustice."

The section is copied from Article 95 of the German Exchange Law, and undoubtedly is a departure from the English act, under which the pretended agent is liable, not on the instrument, but for the damage resulting from the breach of his implied warranty of authority to sign for the principal. Mr. Crawford's original draft embodied the English rule,[2] but the Commissioners changed it and adopted the German rule deliberately and after mature consideration. It is scarcely true that in doing so they departed from "the almost uniform current of judicial decisions." There is a strong conflict of authority on the point, some states holding the pretended agent liable on the instrument itself, while a somewhat larger number hold him liable only for the damage resulting from the breach of his implied warranty of authority.[3] The latter decisions seem correct on theory. As was said in Hall *v.* Crandall, if the instrument contains language which does not in legal effect charge the pretended agent, "or, in other words, contains language which, in legal effect, binds the principal only, the agent cannot be sued on the instrument itself, for the obvious reason that the contract is not his." He has falsely represented that he had authority to bind another, but he has not intended or attempted to bind himself, and courts which hold him liable on the contract

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[1] "Mr. Crawford so interprets the section. Crawford's An. N. I. L. 26."

[2] Crawford, An. N. I. L. 26.

[3] In the following states the pretended agent appears to be held liable on the contract itself: Ormsby *v.* Kendall, 2 Ark. 338 (but see Dale *v.* Donaldson, 48 Ark. 190); Richie *v.* Bass, 15 La. Ann. 668; Terwilliger *v.* Murphy, 104 Ind. 32; Keener *v.* Harrod, 2 Md. 63; Byars *v.* Doores, 20 Mo. 284; Weare *v.* Gove, 44 N. H. 196; Clarke *v.* Foster, 8 Vt. 98.

In the following states, the pretended agent is held liable not on the contract itself, but for the damage resulting from the breach of his implied warranty of authority: Hall *v.* Crandall, 29 Cal. 567; Johnson *v.* Smith, 21 Conn. 627; Duncan *v.* Niles, 32 Ill. 532 (but see Frankland *v.* Johnson, 147 Ill. 520); Bartlett *v.* Tucker, 104 Mass. 336; Noyes *v.* Loring, 55 Me. 408; Sheffield *v.* Ladue, 16 Minn. 388; White *v.* Madison, 26 N. Y. 117; Bryson *v.* Lucas, 84 N. C. 680; Hopkins *v.* Mehaffy, 11 S. & R. (Pa.) 126.

itself "treat all matter which the contract contains in relation to the principal as surplusage, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they made for themselves." [1]

Judge Brewster's answer is: "One signing a note as agent for another should know and be able to show his authority. If he signs without authority, he alone in fact, and so in law, is the maker of the note, and he should be held liable accordingly." This view, though perhaps difficult to justify on the principles of contract, is supported by weighty authority,[2] and important practical advantages. The rule will tend to increase negotiability, by assuring the holder that if the pretended principal cannot be reached because of a lack of authority in the agent, a recovery may be had on the instrument itself against the agent. Then there is the additional advantage — which on reflection will appear to be of great importance — that the liability of the agent can be easily proved and the amount to be recovered ascertained by a mere inspection of the instrument, whereas if the only recovery were for damages resulting from a breach of warranty, a complicated set of disputed facts would often go to the jury, from which it would be difficult even to approximate the damage. The case which Professor Ames supposes, as proving the injustice of Section 20 may serve as an illustration of this. He says, "For example, A., mistakenly believing that he is duly authorized, signs a note, 'A., agent for B.,' and delivers it to C., the payee. At

[1] Hall *v.* Crandall, *supra*. Referring to the cases which hold the pretended agent liable on the instrument, Walton, J., said in Noyes *v.* Loring, 55 Me 408: "The inconsistency of such a doctrine, to use no stronger term, will be apparent by supposing that instead of a promise to pay money the pretended agent had signed a promise that his principal should marry the plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?"

[2] To the decisions referred to above, and the very high authority of the German Code, there may be added the opinion of Mr. Arthur Cohen, Q. C. (one of the framers of the English act, and admittedly one of the leading experts in England on this subject), who regards Section 20 as an improvement on the English act. He says: "This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in Cohen *v.* Wright has often been doubted. . . . I think the 20th Section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority." Letter from Mr. Cohen to Judge Brewster, written March 31, 1901.

maturity B. repudiates the note. He is, however, at that time a bankrupt. A. is rightfully chargeable to C. on his implied warranty of authority, but only to the amount that C. might have recovered from B., if he had authorized the note. But under Section 20 A. is liable to C. for the face of the note." But, as Mr. Cohen points out, "It would be doubtful what could be recovered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could probably be recovered from the principal. It may well be held that in actions on negotiable instruments against a person who professedly acts on behalf of another person, A., it would be inconvenient to allow the former to attempt to prove that probably the whole amount could not be recovered from A."

So the case stands about as follows: The rule discarded by the Commissioners works out the rights of the parties strictly on the rules of contract, and the balance of authority is in its favor. Under it, however, a plaintiff may encounter considerable difficulty and uncertainty in proving his case. The rule they have embodied in the act — while perhaps less clear on theory — is supported by the authority of several states, by the German Code, by some of the best expert opinion of England, and (besides tending to increase negotiability) enables a plaintiff to know and prove, with ease and certainty, the amount to be recovered. Of course, under such circumstances, individual opinion will differ somewhat as to which rule should have been chosen.

Section 22:

> "The indorsement or assignment of the instrument by a corporation or by an infant *passes the property therein*[1] notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

Professor Ames says, "Does this section, like the corresponding section of the English act,[2] mean merely that the indorsee has the right to enforce payment from all parties prior to the infant,

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[1] The italics are inserted by the reviewer.

[2] English Bills of Exchange Act, Sec. 22, par. 2: "Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

or does it mean that the indorsee becomes absolute owner of the instrument, so that he and his transferees, whether with or without notice of the infancy, may retain the instrument even against the infant? If it was intended to reproduce the effect of the English act on this point, it is unfortunate that the unambiguous language of that act was not retained. If, on the other hand, it was intended to make the infant's transfer of negotiable paper irrevocable, the section introduces a radical change in the law as to the rights of infants, and one that goes unnecessarily far in protecting an indorsee who knows that he is dealing with an infant."

There are two criticisms here. The first is that the language is ambiguous and may mean that the infant's indorsee takes an *indefeasible* title. As a proof of this, Professor Ames states that some members of Judge Brewster's committee assured him that this was the purpose of the section. Judge Brewster replies that the American and English acts mean the same thing and that he never heard of any other interpretation.

It is to be regretted that Professor Ames does not indicate the reasoning by which this section could be interpreted as giving an indefeasible title. It is the practically universal rule with us that an infant's acts are voidable merely and not void.[1] Of course, then, when he indorses a note he "passes the property therein." That is simply stating what has been the law for years. Without discussing whether he is or ought to be permitted later to annul his act, it is clear that his indorsement, which certainly is not void, "passes the property" in the note. As to his right to revest the title in himself, the act is silent. Now, a statute which decides one point and leaves another point untouched, is not ambiguous. Nor does Professor Ames tell us why the English act is any different from ours. The language there used is that the infant's indorsement "entitles the holder to receive payment of the bill, and to enforce it against any other party thereto." But to enforce payment the holder must have title to and possession of the bill. Therefore the English act provides that the indorsement "passes the property." Moreover, that is all it does provide. It does not provide that the holder may enforce it only until the infant avoids

[1] In England by the Infant's Relief Act, 37 and 38 Vict., Ch. 62 (1874), the common law rule is abrogated to the extent of making the contract of an infant absolutely void. But throughout the United States the common law rule that it is voidable merely prevails universally.

his act and reclaims the instrument. On that point, it is as silent as our act. Yet the critic would have us believe that under the English act the infant clearly may reclaim the instrument, but that our act is ambiguous on this point. Both acts provide exactly the same thing, and since it appears never to have been specifically decided whether an infant may reclaim a negotiable instrument that he has indorsed, both acts are precise codifications of existing law.

In the absence of authority on that point, the framers of the American and English acts did well to leave the question untouched. Whether they did so unintentionally or not is of small moment. Professor Ames is of opinion that the infant should be allowed to reclaim the instrument as against a holder with notice, but not as against a holder in due course.[1] Probably all would agree that the title of the holder in due course should be indefeasible. The importance of preserving the untrammelled negotiability of bills and notes leads some to conclude that even a holder with notice should be protected as against the infant. The point is that this question is within the province of a judge and not within the province of those engaged in *codifying* the law.

Section 23:

> "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

In a supplementary note, published subsequently to the articles in the Harvard Law Review, Professor Ames says that the need of amending Section 23 is shown by the case of Tolman *v.* American National Bank,[2] decided by the Supreme Court of Rhode Island in March, 1901.

An interesting line of cases is involved in the discussion of this section. Suppose A., falsely representing himself to be B., a citizen of X. town, goes to C. for a loan. C. makes inquiry concerning B., and finding him to be a prosperous and responsible merchant

[1] See also Ames' Cases on Bills and Notes, Vol. 2, title "Infancy," p. 840, and title "Transfer" (18) on p. 881.

[2] 48 Atl. R. 480.

of X. town, hands A. a check payable to the order of B., whom he supposes that A. is. A. indorses the check in B.'s name and A. or his indorsee has it cashed. The question then comes up between the bank and C. (the drawer) as to who shall bear the loss. This set of facts, with strikingly few variations, has been presented in numerous cases, all of them, prior to the case of Tolman *v.* American National Bank, holding that C. must bear the loss.[1]

This result may be reached in several ways, none of which is without difficulty.

1. You may hold that A., albeit he is representing himself by a name falsely assumed for the purpose of deceiving C., is the real payee, the person to whom C. intended that the check should be paid. Under this view, any question as to C.'s negligence becomes immaterial. He must bear the loss, not because he has negligently trusted a stranger, but because the physical person who stood before him and with whom he dealt is the person whom he intended the bank should pay. The difficulty with this view is that although C. intended that the money should be paid to the person standing before him, it is equally true that he intended that it should be paid to B. of X. town.

2. You may hold that the drawer is liable because he has negligently trusted a stranger, but this view is unsatisfactory because none of the cases in point go on this ground, and because

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[1] U. S. *v.* Nat. Bank. 45 Fed. R. 163; Meyer *v.* Indiana Bank, 61 N. E. Rep. 596; Emporia Bank *v.* Shotwell, 35 Kan. 360; Robertson *v.* Coleman, 141 Mass. 231; First Bank *v.* American Bank, 49 N. Y. App. Div. 349; Merch. Bank *v.* Metropolitan Bank, 7 Daly, 137; Land Title and Trust Co. *v.* N. W. Bank, 196 Pa. 230; Metzger *v.* Franklin Bank, 119 Ind. 359.

And see Meridian Bank *v.* First Bank, 7 Ind. App. 322; Elliott *v.* Smitherman, 2 Dev. & B. (N. C.) 338; Forbes *v.* Espy, 21 Oh. 474, in which, though the name adopted by the swindler appears to have been really fictitious, the loss is thrown on the drawer for the same reason as that which governed the former cases.

The same rule prevails as to the sale of chattels: Edmunds *v.* Merch. Co., 135 Mass. 283; Samuel *v.* Cheney, 135 Mass. 278; Dunbar *v.* Boston R. R. Co., 110 Mass. 26; Alexander *v.* Swackhamer, 105 Ind. 81.

A case interesting (though not quite in point) in connection with the rule here discussed is Gravis *v.* The American Exchange Bank, 17 N. Y. 205, which holds that if a check be made payable to one person and another person of precisely the same name or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it, and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. Possibly this carries the bank's liability to an excessive point. It would seem that the drawer, having represented that any man named John Smith is the payee, should be estopped to deny that the particular John Smith who indorsed the check and had it cashed is the payee.

the loss is thrown on C., even when he has admittedly exercised all reasonable diligence.

3. You may hold that the payee is fictitious, and that the check is therefore payable to bearer; but such an instrument is payable to bearer only when the drawer knows that the payee is fictitious. Moreover, if B., of X. town, is in existence and known to the drawer, such a view is clearly untenable.

4. You may hold that C. is estopped to deny that A., to whom he gave the check, is the real payee. But *estoppel* cannot operate unless the fact represented be known to and acted on by the bank, and where the swindler indorses the check to a *bona fide* holder who cashes it (and this is what happened in most of the cases) the bank knows nothing of the delivery to A. and does not rely on the drawer's representation that he is the payee.[1]

As a matter of fact, the courts base their decision on the first ground, namely, that the bank has merely carried out the drawer's intent. Here and there an expression may be singled out which seems to countenance one or more of the other views, but a fair reading of the opinions shows that one idea dominates nearly all of them, namely, that the money has been paid to the person for whom it was really intended. The reasoning is briefly this: A man's name is the verbal designation by which he is known, but the man's visible presence affords a surer means of identification. C. was deceived as to the man he was dealing with, but he dealt with and intended to deal with the visible man who stood before him, identified by sight and hearing. Thinking that this man's name was B., he drew the check to B.'s order intending thereby to designate the person standing before him; so the bank has simply paid the money to the person for whom it was intended.

Such was undoubtedly the law prior to the act. By Section 23, when a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative

[1] However, in an interesting note to Land Title and Trust Co. *v.* Bank, 50 L. R. A. 83, the above objection to the estoppel theory is claimed to be invalid, the argument being: When the bank pays a check upon a forged indorsement it acts on the belief that the person who indorsed it was the person whom the drawer intended to designate as payee. This belief is largely — and when the person who presents the check is not identified — is solely induced by the fact that the check is, or was at the time of indorsement, in the impostor's possession. The drawer — by delivering the check to the impostor in the belief that he is the person named as payee — creates the appearance on which the bank acts.

except as against the person who "is precluded from setting up the forgery or want of authority." In the light of the cases above referred to, the meaning of this section, as applied to the point under discussion, seems reasonably clear. The drawer (C.) "is precluded from setting up the forgery or want of authority" and so the signature is not inoperative as to him and the law remains unchanged.

In 1899, Rhode Island adopted the Negotiable Instruments Law and in 1901 the case of Tolman *v.* American National Bank arose in that state.

In that case, one Louis Potter, representing himself to be Ernest A. Haskell, went to the plaintiff (Tolman) for a loan of money, giving the occupation and residence of Haskell as his own. The plaintiff made inquiry, and finding that Haskell was employed and was living as represented, gave Potter his check on the defendant bank payable to the order of Haskell. Potter indorsed Haskell's name and delivered the check to one A. R. Hines, who had it cashed at the bank. In an action by Tolman to compel the bank to credit him with the amount of the check, the court held that the bank must bear the loss.

As Professor Ames remarks, "the decision is a surprising one, both from the standpoint of common law principles, and of Section 23 of the act. All the reported cases on the point of fraudulent impersonation are against the decision. As a statutory question, but for this decision, the liability of the drawer would seem clear under the last clause of the section."

It is worth while to analyze the opinion of the court. It divides itself into three parts, and the reasoning of the learned Chief Justice Stiness may be summarized as follows:

1. When a bank receives money, it is to be paid out only as the depositor shall order. Therefore, if it pays on a forged indorsement, it bears the loss, unless the depositor is estopped by negligence from alleging the forgery. Therefore, *since Tolman intended that the money should be paid to the order of Haskell, and since Haskell has not indorsed the check, and since the plaintiff has not misled the defendant, the bank must bear the loss.*

2. The above reasoning represents what the law was "when, a few years ago, it seems to have been switched off on a fallacy in some places." To show that this formerly was the law, the learned judge cites three English and four American cases, not one

of which presents the point involved in Tolman *v.* The Bank. Coming, then, to the line of cases involving substantially the same facts as Tolman *v.* The Bank, in all of which the drawer was held liable, the learned judge says that these are based on a manifest fallacy and ignore the distinction between fictitious and real payees.

3. Section 23 brings the law back to where it was before it was "switched off on a fallacy." An application of this section to the case at bar shows this. The signature here is clearly one "made without the authority of the person whose signature it purports to be." Therefore, it is wholly inoperative except as against a person who "is precluded from setting up the want of authority." But Tolman is not precluded, for he has been guilty of no conduct which misled the bank and so is not estopped from showing that the bank did not pay as directed. Judgment for Plaintiff.

Three observations may be made on this opinion:

1. In stating what the law was before it was "switched off on a fallacy" the learned judge is really stating what in his opinion the law should have been. There is no case in point to sustain him. Prior to the cases against his view, there are no cases in point at all.

2. As to "the manifest fallacy" in which the uniform current of authority has its source, the learned judge says that it is caused by ignoring the distinction between real and fictitious payees — that in the latter case, there can be no one in the mind of the drawer other than the person with whom he is dealing — but that "*in the case of a real person, one party having him in mind satisfies himself about the responsibility of such party and supposes that he is dealing not with the person who is in fact before him, but with the one whom he has in mind.*" But the numerous cases which oppose the learned judge go on the ground that *the real person whom the drawer has in mind is the man standing before him.* True, this ignores the fact that the drawer supposed him to be B., of X. town, but the other view ignores an equally important fact, *i.e.* that he intended to deal with and lend the money to the person standing before him. One view is about as satisfactory as the other in interpreting the drawer's real intention. Moreover, the view which holds the drawer liable, in case B., of X. town, does not exist, even though the drawer made all reasonable inquiry and was deceived into believing that he did exist, but protects

him in case B., of X. town, is in existence, makes a distinction which does nothing to increase the actual justice meted out.

3. When a *code* is, as here, entirely in accord with a settled rule of law, what justification is there for holding that it meant to upset that rule and establish one which never was the law?

Judge Brewster replies, "The exact point in Tolman *v.* Bank was simply this: was it 'precluding' negligence for Tolman to trust the stranger Potter, with no further inquiry than that stated in the opinion? On this precise point as to a 'stranger payee' there are but two exact precedents.[1] The first is National Bank *v.* Nolting.[2] This case holds the bank liable, saying, 'To hold that giving a check to a stranger . . . was sufficient . . . evidence to excuse the bank . . . would be to relieve the bank from a just responsibility.' The second case is Smith *v.* Mech. Bank.[3] This case, by a divided court, held the bank not liable."

Of this defence, it may be observed first, while the lack of negligence may have been the ground on which the decision in Tolman *v.* Bank was based, it was not, according to all the cases in point, the question really involved. The well-settled rule applicable to these facts renders the question of negligence wholly immaterial because it declares that Potter was the real payee. Admit that he is not the payee, then the drawer is liable only in case he is estopped. But the latter view has never been the law. Thus it is that in the numerous cases which are exact precedents on this point, though the degree of care exercised by the drawer differs, the decisions are the same, for the very reason that they proceed on a ground which renders negligence immaterial.

Second, the two cases cited by Judge Brewster are not precedents at all. National Bank *v.* Nolting was a case of the *alteration* of a check, and the point decided was that the check, having been properly drawn, the mere fact that it was delivered to a stranger did not estop the drawer from showing that it had been raised from ten dollars to five hundred dollars. Smith *v.* Mech. Bank comes somewhere nearer being in point, though it differs from Tolman *v.* The Bank in at least one vital particular. In the former case, the swindler did not represent himself to be P. & W., the firm in whose favor the check was drawn. It was made payable to P. & W., who were known to the drawer, for the very

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[1] 5 Amer. and Eng. Ency. of Law, Second Edition, 1066.
[2] 94 Va. 263.
[3] 6 La. Ann. 610.

purpose of compelling the stranger concerning whom the drawer realized that he knew nothing, to go to P. & W. and get their indorsement. Of course, then, when the stranger forged their signature, the drawer could not be held liable on the ground that the stranger was the man to whom he intended to make the check payable.

Judge Brewster further remarks, "The theory of the Dean as to the drawer's expectation that the 'physical person before him' would indorse the note had already been shown to be a fallacy." Where and by whom? Not in any of the cases in which the question was raised and not in the two articles which Judge Brewster cites as bearing out his assertion.[1]

It is perfectly evident, then — and indeed this is Professor Ames' position — that the trouble is not with Section 23, but with the case of Tolman *v.* The Bank. Undoubtedly it is unfortunate that the only judicial interpretation that this section has received should serve only to throw doubt on what was previously well settled.[2] But the blame does not belong to the Negotiable Instruments Law. Section 23 — copied from the English act — was, at the time of its adoption, an accurate statement of existing law, and in view of the unanimity that exists among the cases on which it is based, the doubts raised by Tolman *v.* The Bank will probably soon be dispelled and this section will be interpreted as having merely affirmed a well-settled rule.

Section 29:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, *without receiving value therefor,* and for the purpose of lending his

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[1] The admirable little article on "Loss by Check Delivered to Impostor," Case and Comment, Vol. I, No. 7, December, 1900, p. 75, cites no authorities, and although ably stating the difficulty of the "intention" theory, *i. e.*, that "The imposture makes it impossible that both parts of his intent can be carried out," admits that most courts have adopted this view. Moreover, though agreeing with the result of the decisions, it advances no more satisfactory ground on which to base it, the estoppel theory being as open to objection as the intention theory. As for Judge Brewster's negligence theory, the article disposes of that in convincing fashion.

To the same effect is the note in 50 L. R. A. 83 Moreover, both of these articles agree that the *drawer* should bear the loss.

[2] It is not denied that much might be said in favor of the result reached in Tolman *v.* The Bank, did the question arise *de novo.* The point is that when once so difficult and doubtful a point is clearly settled, mischief and not good results from reopening the matter and involving it in doubt. As matters stand to-day, no lawyer could advise a client, with any certainty, on this point.

> name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." [1]

The criticism is, "By this definition, one who has received a commission, which is certainly value, for lending the credit of his name, would not be an accommodation party. But no business man or good lawyer would sanction such a distinction. . . . To take a concrete case. A. offers B. ten dollars if he, B., will sign a note of $1,000 for A.'s accommodation. B. accepts the ten dollars and signs the note. Can anyone seriously doubt that B. is an accommodation party? If he is, the definition in this section is erroneous."

Judge Brewster's answer is that the definition of an accommodation party given in Section 29 is the same as the definition given by "all the cases, all the text writers, and all the encyclopedias,[2] the law dictionaries, and the ordinary English lexicons. . . . The only reason given for the overthrow of all these authorities is an illustration intended apparently to demonstrate the difficulty of showing what is value and what is not, but which in reality indicates value on its face."

Professor Ames replies that Judge Brewster's answer only shows "that he and his colleagues erred in good company."

The last sentence quoted above from Judge Brewster leaves something to be desired from the standpoint of clearness, but apparently the judge thinks that under Section 29 B. (in the case supposed) is not an accommodation party.[3] A moment's reflection shows the error of this. B. ought to be regarded as an accommodation party. Though doubtless partially induced by the ten dollars to sign his name, his real purpose in signing (however that purpose may have been induced) was to lend credit to A. B. received nothing *for the note*. He did not become a holder for value of it. On the contrary, what he did receive came from

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[1] This is a copy of Section 29 of the English Act.

[2] Judge Brewster refers to Amer. and Eng. Ency. of Law, Vol. I, pp. 335–36; 1 Daniel, 189; Tiedeman, Sec. 158; Byles on Bills, star p. 131; 2 Randolph, 472; Norton's Horn-Book (1900), 176; Bigelow, Second Edition, cites the definition given by the Negotiable Instruments Law as the true definition; Standard and Webster Lexicons.

[3] Mr. John L. Farrell also thinks that B. is not an accommodation party. See article in Brief of Phi Delta Phi, Vol. III, No. 20, Quarter (1901). But Mr. Farrell, like Judge Brewster, ignores the meaning of the word "therefor."

his *transferor* (assuming that B. ever became the holder of the note at all) and the note was negotiated solely for A.'s benefit, who received the consideration paid for it. Moreover, B. is an accommodation party under Section 29. Mr. Cohen hits the nail squarely in stating the meaning of this section. "'Without receiving any value therefor' means without receiving any value for the bill, and not *without receiving any consideration for lending his name*." Thus B. is an accommodation party because he has received no value for the instrument, though he did receive ten dollars for signing his name to it.

Probably no harm would have resulted had the Commission adopted Professor Ames' suggestion and omitted the words "without receiving value therefor and," but since their insertion requires merely that proper care be exercised in interpreting the word "therefor," no difficulty need be anticipated on this point. It may be added that the same words used in the English act have proved entirely satisfactory.

Section 34:

> "A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

"This," says Professor Ames, "is an inadequate definition" because "it is nowhere stated that an indorsement, like the drawing of a bill, is an order. If the payee writes "I assign this note to B.," or "I guarantee to B. the payment of this note," is he liable as indorser on his assignment or guarantee? Is his transferee an indorsee, and therefore within the rule that gives a holder in due course title free from equitable defences? There are numerous but conflicting decisions on these points,[1] and it is unfor-

[1] "In ten states a payee who transfers a note by writing on the back, 'I assign this note to X.,' assumes the liability of an ordinary indorser. In six states such an assignor is not an indorser. In thirteen states the assignee, like an indorser, acquires title free from equities good against the assignor. In two states the assignee takes subject to such equities.

"In three states a payee who transfers a note by writing on the back, 'I guarantee the payment of this note to X.,' is liable as an indorser. In ten states he is not so liable. In thirteen states the transferee, like an indorsee, acquires a title free from equities good against the transferor. In three states and in the Supreme Court of the United States, the transferee takes subject to such equities."

tunate that the new code does not secure uniformity here as it does in the matter of notes payable with exchange or attorneys' fees."

Judge Brewster answers that "The liability of a party on a peculiar indorsement, which is outside of negotiability, must be settled by a court."

But, as Professor Ames replies, "The very point in controversy is one of negotiability." Some states hold that language such as that referred to above amounts to an indorsement — others hold that it does not — Professor Ames' point is that the code should have settled this disputed question as to negotiability and that it could have done so by stating in Section 34 that an indorsement, like the drawing of a bill, is an order.

Undoubtedly much would be gained by deciding once for all as to what expressions constitute an indorsement. But the question cannot be settled by enacting that an indorsement is an order. No one ever denied that an indorsement is, among other things, a direction to the maker or acceptor to pay the amount of the instrument to the indorsee, but some states hold that the words "I assign this note to B." amount to such a direction, while others hold that they do not. This is where the courts differ. Therefore, Professor Ames has merely shown that here is a disputed question left unanswered, without showing how it could have been answered by any provision sufficiently brief and accurate and comprehensive to be inserted in a code.

Section 36:

> "An indorsement is restrictive, which either (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person."

Professor Ames says, "Since the so-called 'agent of the indorser' has, under Section 37, the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent. The Subsection 2 and 3 should therefore be consolidated as follows: 'An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person.'"

Judge Brewster replies that although all agents are trustees in the sense that they are ultimately accountable to the principal, all agents are not technically trustees, and that the distinction between an agent and a trustee is embodied in Section 36 to relieve the plaintiff from proving an actual trust.

Of course the criticism of this subsection deals simply with its form. Professor Ames does not mean that any difficulty can possibly arise under the language as it stands. He means merely that the substitute he offers is somewhat shorter than the act and more technically correct. When A. indorses a note "Pay to B. for the use of C.," B. has always been termed a *trustee,* as of course he is. When A. indorses a note "Pay to B. for my use" or indorses "for collection" to B., B. has always been termed an *agent.* Professor Ames' point is that "agent" is no longer a correct word to use in describing B. in the latter case, *because* he can now, under Section 37, sue *in his own name* on the instrument, though for the benefit of the indorser. Thus Section 37 vests the legal title in the indorsee, and therefore, says the critic, he is in truth a trustee.

Possibly — though nevertheless it is not clear that the suggested change could have been made without the risk of some misunderstanding. An indorsement for collection has always been regarded as creating a mere agency. Title remains in the indorser, who may terminate the agency at any time before collection and reclaim the instrument. In most states, prior to the act, the agent, not having title, could not sue in his own name. In some, however, he could[1] — the indorsement being deemed to have conferred this authority — but the latter states, though deeming the agent to have received the legal title to an extent sufficient to enable him to sue in his own name, still speak of him and regard him as an *agent* whose authority may be revoked at any time. It is extremely unlikely that Section 37 intended to accomplish anything more than a procedural change. The indorsee for collection was to be allowed to sue in his own name; it was not intended to make any further change in his rights and duties — not intended to alter in any way the legal conception of the relationship that exists between him and his indorser. Was it not, therefore, the wise and safe course to retain the words whose meaning, long use, and repeated construction have rendered unmistakable? Why introduce a word which has never been used to describe an indorsee for collection even by courts which conferred on him the right to sue in his own name?[2]

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[1] Wilson *v.* Tolson, 79 Ga. 137; Boyd *v.* Corbitt, 37 Mich. 52; Moore *v.* Hall, 48 Mich. 143.

[2] It may be added that by Section 35 of the English Bills of Exchange Act, a restrictive indorsement, although it confers on the indorsee the right to sue in his own

Section 37: . . .

This section confers upon the indorsee under a restrictive indorsement the right to bring any action that the indorser can bring.[1] "Inferentially," says Professor Ames, "such an indorsee cannot sue his indorser. This is just, if the instrument was transferred to the indorsee for the benefit of the indorser. But unjust, if the indorsement was for value to the indorsee in trust for a third person." For instance, "A., the holder of a note payable to his order, sells it to B. and is about to indorse it to him, but, at B.'s request, indorses it to X. in trust for B., instead of to B. directly. At maturity of the note, the maker is insolvent, but A. is solvent. By this section, X., the indorser, may sue anyone that his indorser can sue. In other words, he may sue the insolvent maker, but he cannot sue the solvent indorser, A."

The ground upon which Judge Brewster finally rests his defence of this section is "the fact that no trouble has arisen under it in England sufficiently indicates that the immunity the Dean claims for the solvent indorser 'A.' does not exist. Equity would take care of that."

It is too plain for discussion that X., in the case supposed, should have a right of action on the note against the solvent indorser A. How "equity would take care of that" does not appear. Unless X. has his action under a proper construction of this section it is difficult to see how equity could mend matters.

Mr. Farrell makes a useful contribution on this point. He says, "The language of Section 37 is used in a permissive and not in a restrictive sense. Section 36 defines a restrictive indorsement, which limits and circumscribes the utility of the instrument so indorsed as compared with paper which does not bear this qualified indorsement. The following section (37) states the effect of such an indorsement, and the rights of the indorsee, notwithstanding the restrictive feature, and says that it '*confers* the right to bring any action that the indorser can bring.' That does not imply that he could bring no action other than that which his transferor might have brought, and the phraseology of the open-

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name, is, nevertheless, regarded as a mere authority to deal with the bill and not as a transfer of the ownership thereof.

[1] Section 37: "A restrictive indorsement confers upon the indorsee the right, (1) To receive payment of the instrument; (2) To bring any action thereon that the indorser could bring."

ing clause shows that the framers undoubtedly had this in mind when drafting the section." [1]

This argument — while not wholly convincing — makes out the best case that can be presented in defence of the act on this point. Undoubtedly this section could be improved upon, but since it would be gross injustice to refuse X. the right to sue A. and since the real purpose of subsection 37, par. 2, was simply to permit an indorsee under a restrictive indorsement to sue in his own name, the reasoning suggested by Mr. Farrell is sufficient to enable the courts to reach a just result.

Section 40: . . .

Professor Ames criticises Section 40 as being repugnant to Section 9-5. A discussion of this criticism and of Judge Brewster's reply thereto will be found *supra,* pages 123 to 130 inclusive.

Section 49:

> " Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

Professor Ames criticises the first sentence of this section. He agrees that if an indorsement was intended, but omitted through inadvertence, it is obviously just that the transferor should be required to indorse subsequently. But he says that if the omission to indorse was intentional, it is as obviously unjust to compel the transferor to assume the liability of an indorser.

The obvious answer is that the transferor may indorse " without recourse " whenever such an indorsement will carry out the intention of the parties. But Professor Ames thinks that this section does not permit of a qualified indorsement in any case. " In Section 44," he says, " it is provided that any person under obligation to indorse in a representative capacity may indorse in such terms as to negative personal liability. But there is no simi-

[1] Article on the Negotiable Instruments Law by John L. Farrell, Brief of Phi Delta Phi, Vol. III. No. 2, First Quarter (1901).

lar provision for a qualified indorsement in Section 49. Such a provision should be added to this section." The critic's reasoning does not convince. It certainly does not follow that Section 49 requires an unqualified indorsement in every case, simply because Section 44 provides that one under obligation to indorse in a representative capacity may use terms which negative personal liability. Section 49 does not specify any one kind of indorsement. In every case the transferee must go into a court of equity to compel an indorsement. Obviously he will be given the kind of an indorsement to which he is entitled. If the parties agreed that the transferor was not to assume personal liability, an indorsement "without recourse" gives the transferee all that he is entitled to by common sense, by equity or by Section 49.[1]

Professor Ames makes a further objection to this section. "If the transferee by delivery merely of an instrument payable to the order of the transferor always acquires only the rights of the latter, such a transferee of a note made for the accommodation of the payee could not enforce it against the maker, even though he might have given to the payee the money which it was the object of the maker to procure for the payee on the credit of his own name. Such a result would be a reproach to the law, even if due to the action of the courts. But this section, so far from codifying, actually nullifies the judicial precedents in this country." [2]

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[1] The Colorado Legislature added to the sentence requiring an indorsement the words "if omitted by accident or mistake," but for the reason given above the addition was unnecessary, and Judge Brewster refers to Mr. J. Warner Mills, page 23, the annotator of the Colorado act, who says, in speaking of the two forms of expression, "But either form of expression establishes the equitable rule of law."

[2] Of the four American cases cited by Professor Ames, only one can be regarded as supporting his position, viz., Hughes *v.* Nelson, 39 N. J. Eq. 547. (For a convincing argument which expressly disapproves of that case and cites numerous authorities the other way, see Goshen National Bank *v.* Bingham, 23 N. E. Rep. 181.)

In Matthias *v.* Kirsch, 87 Me. 523, the accommodation note in suit, which was unindorsed by the payee, had been given in renewal of a prior note which had been properly indorsed. It was held that the rights of the parties were established by the first note. The plaintiff could have enforced the first note and, having taken the second merely as a renewal of the first, should be allowed to recover. The court expressly based its decision on this ground, stating that but for the transaction previous to the giving of the note in suit, the defendant would have prevailed on the well-settled rule that the delivery of a note before maturity without the indorsement of the payee is a mere assignment and carries with it only the rights of the assignor.

Meggett *v.* Baum, 57 Miss. 22, went entirely on a Mississippi statute, on reasoning which is not applicable in other states.

Freund *v.* National Bank, 76 N. Y. 352, is a poor case with which to sustain any proposition. The court mistook the point and then reasoned incorrectly on what it

Judge Brewster makes no reply to this criticism.

Let us see. A. makes his note for $1,000 payable "to the order of B." for B.'s accommodation. B. transfers it by delivery, without indorsement, to C. for value. Under Section 49, C. may go

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supposed to be the point. The plaintiff drew his check on the defendant bank payable to O. for the latter's accommodation. O. transferred it unindorsed to B. for value. Then B. took it to the defendant bank and had it certified. Later the bank paid the check and the plaintiff (drawer), who, prior to the payment but after the certification, had notified the bank to stop payment of the check, sought to compel the bank to credit him with the amount of it. Judgment for defendant. The opinion first established at some length that B. was an assignee *who succeeded merely to the payee's rights.* Then it reasoned that *since B. could have enforced the check against the drawer,* the bank was justified in paying him or in certifying at his instance.

Two later New York cases (Goshen National Bank *v.* Bingham, 23 N. E. Rep. 181, and Lynch *v.* First National Bank, 13 N. E. Rep. 775) based the decision in the Freund case solely on the ground that the bank certified the check *while it was in the hands of B., the transferee by delivery of the payee* — that under these circumstances the bank took, as it had a right to take, the risk of the title which the holder claimed to have acquired from the payee, and entered into a contract with the holder by which it accepted the check and promised to pay the amount of it to the holder, notwithstanding the lack of indorsement.

The precise point involved in the Freund case was this: Is a bank justified in paying a check to one who is merely the transferee by delivery of the payee? If that question be answered in the affirmative, the bank wins regardless of whether the check was an accommodation one or not. If that question be answered in the negative, the drawer wins. Why? Once admit that payment to the payee's transferee by mere delivery is within the scope of the drawer's order, then the bank is justified in paying the transferee whenever it would be justified in paying the payee. But it is justified in paying the payee regardless of whether the latter gave value for the check or not. Therefore the question of accommodation was wholly immaterial in the Freund case. Still more immaterial, if possible, was the question which arose out of the fact that the payee was an accommodated party, viz., the question whether the transferee by mere delivery had a right of action against the drawer. The question was as to the implied contract that exists between the drawer and the bank. If that contract permits the bank to cash checks only for the payee or his indorsee, then any payment made to the payee's transferee by mere delivery violates the drawer's order. Otherwise, if the contract allows a payment to the payee, or to his transferee by delivery or to his indorsee. (Of course, a bank may certify a check and debit the drawer with the amount of it when and only when it would be justified in cashing the check.) The Freund case decided that the defendant bank would have been justified in paying the check to the payee's transferee by delivery. It follows that it was justified in certifying it at his instance.

It is submitted that the decision is wrong for the reason that if the check should be given to the payee in payment of a debt, the drawer, if sued by the payee on the original consideration, might find it difficult, if not impossible, to prove that the debt had been paid. He must prove that B. (who had the check cashed) was the payee's assignee. But there is no written evidence of that. A check should be regarded as authorizing the bank to pay only to the *payee or his indorsee.* Moreover, this view accords with banking practice, which does not sustain the proposition laid down (though apparently unconsciously) by the Freund case.

into equity, compel B. to indorse, and may then recover against the maker. But until C. gets B.'s indorsement, he is merely B.'s assignee and so cannot recover against the maker. This, says Professor Ames, is a "reproach to the law."

It would not be, if A., induced by B.'s fraud, had executed the note for a valuable consideration. In such a case all would sanction the application of the well-settled rule that the transfer by delivery without indorsement of a note payable to order operates as a mere assignment which vests in the assignee (C.) whatever rights his assignor (B.) had. But as against B., the maker has the defence of fraud, so C. cannot recover. Why should there be a difference between the defence of "fraud" and the defence of "accommodation"?

Professor Ames' reason is that A. gave the note to B. to enable the latter to raise money on it. He lent his credit for that purpose. And since B. has in fact raised money on the note by using A.'s credit, A. should not be allowed to escape liability to C. That is an argument *ad hominem*. It does not contain any legal reason for holding A. liable. Of course, he meant to lend B. his credit. But he lent it to him by executing a promissory note in which he promised to pay "to the order of B." Those words have a very definite legal meaning, viz., to pay to B. or to one who holds under his indorsement. That is A.'s promise. What reason is there for saying that he intended to assume a broader liability? By what legal principle can he be held liable on any promise other than the one he has made? Why should the law be "reproached" for insisting that those who seek to avail themselves of the unusual and extraordinary protection extended to commercial paper must comply with the rules which govern commercial paper — rules universally understood and which are merely a statement of those everyday business customs which really created and govern this branch of the law? It is a fundamental and an almost universal rule of law that no one can transfer a better title than he possesses An exception exists in favor of those who become the holders in due course of commercial paper. The proper method of becoming a holder in due course is very simple, and little authority and still less reason can be presented for protecting those who through design, carelessness or ignorance seek to dispense with that method.[1]

[1] Section 49 is copied from Section 31, par. 4, of the English act. See Chalmers' Bills of Exch., Fifth ed., pp. 103 to 105.

Section 64:

"When a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Prior to the act, no part of the law of Bills and Notes was more difficult and confused than the rules regulating the liability of the anomalous indorser. This kindly individual was held liable in various states as first indorser, second indorser, joint maker, and guarantor. Even then his liability was in most cases merely "presumed," and the question, in what cases and by what evidence could the presumption be rebutted, gave rise to various answers. All agree that Section 64, which deals with this question, is a long step forward. It unifies the law and lays down rules admirably framed to carry out the intention of the parties.

Professor Ames fully appreciates the excellence of this section, but thinks that it might be improved in one particular. He says, "Section 64 is an excellent piece of codification but for one slip. One not otherwise a party to a bill payable to the order of the drawer may sign it for the accommodation of the acceptor, as in Matthews *v.* Bloxsome.[1] He should clearly be liable to the drawer-payee. But by Subsection 2 he is liable only to parties subsequent to the drawer."

To illustrate: X. is willing to sell goods to A. on credit provided B. becomes surety for A. So A. makes his note payable to X., gets B. to indorse it, and delivers it to X. in exchange for the goods. By Subsection 1, B., the surety, is liable to X. This is the correct result and the one intended by the parties. Suppose, however, that they attempt to accomplish it in a different way. Suppose X. draws on A. payable to his own order, A. accepts, gets B. to indorse, and hands the bill back to X. X. sells it to Y. It is dishonored at maturity and X. is compelled to take it up. X. now has no right over against B. All intended that B. should be-

[1] 33 L. J. Q. B. 209. For a similar case see Young *v.* Glover, 3 Jurist, N. S. 637.

come liable to X., yet, the bill being payable to the order of the drawer, Subsection 2 makes B., the anomalous indorser, liable not to the drawer-payee, but only to parties subsequent to the drawer-payee. Professor Ames' point is that Section 64 should be amended so as to render B. liable to X. in the latter case.[1]

Judge Brewster misapprehends Professor Ames' meaning on this point. He regards the critic as saying that the anomalous indorser should be liable to the *maker or drawer whom he has accommodated with his signature,* in cases where the maker or drawer is the payee. But Professor Ames does not say that. The case he speaks of and the hypothetical case he puts forward is a case in which the *acceptor* is accommodated by the anomalous indorser. Where the drawer-payee is the accommodated party, Professor Ames agrees with Subsection 3, which renders the anomalous indorser in such case liable only to parties subsequent to the drawer-payee. To this misapprehension of the critic's meaning must be attributed Judge Brewster's statement that "The Dean's proposed substitute would defeat the purpose of the act." It would not. The proposed substitute would leave the act precisely as it is, except that an anomalous indorser who signed *for the accommodation of the acceptor,* a bill payable to the drawer's order, would be liable to the drawer-payee.[2]

In another place Judge Brewster says that by Section 64 the anomalous indorser is to be liable *to all subsequent parties.* This is the answer to Professor Ames, if any there be. Of course, the only liability that the regular indorser assumes is to subsequent parties. That is the contract created by the law merchant. But

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[1] Professor Ames proposes to meet the difficulty by making the first two sections of Section 64 read as follows:

1. "If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties."

2. "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

[2] In his second paper, Judge Brewster remarks, "As the Dean's definition of accommodation paper includes paper for value received, his new illustration has no meaning if the illustration makes 'B.' an accommodation indorser." A remarkable sentence. All anomalous indorsers are accommodation parties in the sense that they sign for the purpose of lending their credit. But very few accommodation indorsers are anomalous indorsers. And these are anomalous indorsers not because they received no value, but because they signed before delivery instruments to which they were not otherwise parties. Therefore, whether or not "B." in the case supposed received value is absolutely immaterial.

one, not otherwise a party to an instrument, who puts his signature thereon before delivery, is not a regular indorser. His position is anomalous. So far, therefore, as any technical rule goes, he could be held to the liability of a first indorser, second indorser, joint maker, or guarantor. Section 64 attempts, and with much success, to fasten on him the liability which he intended to assume. In one case, however, namely, where he signs, for the accommodation of the acceptor, a bill payable to the order of the drawer, the section makes his liability less than he intended. Professor Ames' substitute would remedy this defect without making any other change. It would seem, therefore, that admirable as Section 64 now is, Professor Ames' substitute would have been even better.

Sections 65 and 66:

"Sec. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, *warrants,*

"1. That the instrument is genuine and in all respects what it purports to be:

"2. That he has a good title to it;

"3. That all prior parties had capacity to contract;

"4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

"*But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.*

"The provisions of Subdivision 3 of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

"Sec. 66. Every indorser who indorses without qualification, *warrants to all subsequent holders in due course:*

"1. The matters and things mentioned in Subdivisions 1, 2, and 3 of the next preceding section; and

"2. That the instrument is, at the time of his indorsement, valid and subsisting.

"And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

Sections 65 and 66, which deal with the so-called "warranties" of one who negotiates a bill or note, can best be considered together.

Early English cases established that one sued as acceptor, drawer or indorser upon a bill or note was "precluded" from denying to a holder in due course certain things. The acceptor was precluded from denying the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the bill,[1] and the existence of the payee and his then capacity to indorse.[2] The drawer was precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.[3] Similarly the indorser was precluded from denying the genuineness and regularity in all respects of the drawer's signature and all previous indorsements,[4] nor could he deny that the instrument was, at the time of his indorsement, a valid and subsisting bill, to which he then had a good title.[5]

These cases preclude him on the ground that by drawing, accepting or indorsing, he admits certain facts which he is afterwards estopped to deny. Nothing is said in these cases about "warranties." None of them place the indorser's liability on the ground that he has made a collateral agreement warranting, for instance, the genuineness of the drawer's signature. Of course, under the view adopted in these cases, the estoppel works for the benefit not merely of the immediate indorsee, but for all subsequent holders in due course.

The provisions of the English Bills of Exchange Act accord with this view. By Section 54, par. 2, the acceptor "is precluded from denying to a holder in due course," etc. Section 55 "precludes" the drawer. Section 55, par. 2, "precludes" the indorser. On the other hand, by Section 58, one who negotiates by mere delivery a bill payable to bearer, while of course not liable on the instrument, is in the position of the vendor of a chattel and "warrants" to his immediate transferee, being the holder for value, that the bill is what it purports to be, that he has a right to

[1] Cooper *v.* Meyer, 10 B. & C. 468, 1830; Sanderson *v.* Collman, 4 M. & Gr. 209, 1842.

[2] Drayton *v.* Dale, 2 B. & C. 293, 1823.

[3] Collis *v.* Emett, 1 H. Bl. 313, 1790; Phillips *v.* Im Thurn, 18 C. B. N. S. 694, 1865.

[4] *Ex parte* Clarke, 3 Brown, C. R. 238, 1791; Thicknesse *v.* Bromilow, 2 Gr. & J. 425, 1832; McGregor *v.* Rhodes, 6 E. & B. 266, 1856.

[5] Burchfield *v.* Moore, 23 L. J. Q. B. 261, 1854.

transfer it, and that he knows no fact which renders it valueless. And these warranties, like the warranties of the vendor of a chattel, extend only to the immediate transferee, and can be extended to a subsequent holder only by an express assignment by that transferee.

Turning now to the American act, we find that it follows the English act in regard to the incidents of the contracts of the drawer and acceptor. By Section 61, the drawer by drawing the instrument "*admits* the existence of the payee and his then capacity to indorse." By Section 62, an acceptor "*admits*" the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the instrument, and the existence of the payee and his then capacity to indorse.

But coming to the *indorser,* we find that by Sections 65 and 66 he "*warrants*" to all subsequent holders in due course the matters and things enumerated in these sections. The use of the word "Warranty" in this connection did not start with the Negotiable Instruments Law. For some years past the American courts have said that an indorsement is a warranty of the genuineness of the instrument's existence and capacity of prior parties, etc. The word has been loosely used and often interchangeably with such expressions as "precludes the indorser from denying" — "estops the indorser to deny" — or, "is an admission," [1] though in some respects the courts have regarded it as a strict legal warranty and have held, for instance, that since the warranty is broken, if at all, at the time of transfer, the warrantor may be sued immediately, before maturity, and without presentment or notice.[2]

Nor can it be doubted that Sections 65 and 66 of the American act use the word "warrants" in its proper legal sense. "The

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[1] "Obviously this is not a necessary result of the indorser's conditional undertaking to pay; and, in the absence of plain public policy calling for it, the existence of such a warranty, taking the word in its ordinary sense, should depend upon the custom. The judicial dicta (and generally the language of the courts in the matter is nothing more) have, however, become so common as to create the belief that warranty is an incident of indorsement. And the statute at last has confirmed the belief and turned a number of loose and unnecessary dicta into law, while at the same time it follows the custom in regard to the incidents of the contracts of the drawer and of the acceptor, treating *their* acts as admissions merely." Bigelow on the Law of Bills, Notes and Checks, 2d Edition, p. 99.

[2] Turnbull *v.* Bowyer, 40 N. Y. 456, 1859; Warren-Scharf Co. *v.* Com. Bank, 97 Fed. R. 181, 1899; Copp *v.* McDougall, 9 Mass. 1, 1812; Blethen *v.* Lovering, 58 Me 437, 1870.

fact that the American statute departs, at this point, from the English statute, on which it is based, which indeed it generally follows *ipsissimis verbis,* and that it makes a distinction in terms between the incidents of indorsement and those of drawing and accepting, leads to the inference that the word ('warrants') is used in its primary sense. Something certainly is meant beyond indorsement according to the legal import of that act, for the indorser 'warrants' and in *addition* he 'engages,'" etc.[1]

Now for the criticism. It will be observed by Section 66 that the indorser without qualification "warrants to all subsequent holders in due course." Professor Ames, while evidently concurring in the use of the word "warranty," says that to extend it to all subsequent holders in due course is a misconception of the nature of a warranty. His position is: — An indorsement is (1) a transfer of title, (2) a contract to pay the instrument in case of dishonor. The warranty has no connection with the indorser's liability on his contract of indorsement. Like the warranty of the vendor of a chattel, it is a mere incident of the transfer of title. Moreover, the warranty is a collateral agreement, quite extrinsic to the instrument. Plainly, then, the indorser's liability for a breach of warranty *extends only to his immediate indorsee as a vendee.*

Theory aside for a moment, it is certain that had the act limited the so-called "warranties" to the immediate indorsee, it would have changed the law. These rules were based originally upon the doctrine of estoppel; yet, whatever be their true explanation, it seems never to have been denied that one who indorses a bill without qualification cannot, as against any subsequent holder in due course, plead, for instance, that the drawer was without capacity to contract. Exen those who speak of the incidents of the indorser's contract as "warranties" hold this view. So that in extending this protection to all subsequent holders in due course, the act has merely *codified* that which has long been the law. As to the theory of the criticism — there can be little doubt that the "warranties" of the indorser (for such they are under the act) are incidents of the *transfer* of the instrument and not of the contract of indorsement. But of course, like other choses in action, they are assignable, and there is no serious difficulty in saying that they require no express assignment, but are assigned by the indorse-

[1] Bigelow on the Law of Bills, Notes and Checks, 2d Edition, p. 99.

ment of the instrument. Of course, it will be asked, why should an indorsement be considered as the assignment of a collateral contract, which is an incident, not of the contract of indorsement, but of the transfer of the instrument? The answer must be that such an interpretation of the indorsement best carries out the intention of the parties and preserves or tends to preserve the untrammelled negotiability of the instrument by affording this protection to the holder in due course. It is further to be observed that in one sense these warranties do arise from the contract of indorsement. As Mr. Norton points out,[1] upon the strict analogy of the sale of other personal property, it would follow that the implied "warranty" of the indorser would be confined to a warranty of title. But the indorser also warrants that the instrument is genuine and that the drawer had capacity to contract. The real reason for this is that he may not set up facts which are wholly inconsistent with his promise of indemnity.

So we see that thus far the results reached by Section 66 are just, and are based on sound business sense. The only difficulty is that we are now obliged to explain as a "warranty" that which arose as an estoppel. Yet the difficulty is not insuperable if we regard them as choses in action, extrinsic to the instrument, but peculiar only in this, that they require no express assignment, but are assigned by the indorsement of the instrument.

This prepares us for the next criticism. Turning back to Section 65, we find that a warranty of the transferrer by delivery inures only to the benefit of his immediate transferee, whereas the similar warranty of the indorser "without recourse" runs in favor of all subsequent holders. The critic says that the idea that the indorser "without recourse" is liable to any but his immediate transferee is an original invention of the Negotiable Instruments Law.[2] "To say that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee,

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[1] Norton on Bills and Notes, 3d Edition, 163.

[2] Judge Brewster answers this by showing that the view adopted by the act was asserted by Professor Ames some twenty years ago. "An indorsement without recourse, like a transfer by delivery merely, being, in substance, a sale, the indorser is responsible to the indorsee *and subsequent holders* for the validity of the title and the genuineness of the instrument which he purports to sell." 11 Ames' Cases on Bills and Notes, p. 840. The Dean smilingly replies that that was a youthful indiscretion committed in his callow days.

but to no subsequent purchaser, for the genuineness and title of the thing sold." [1]

Of course, under the English view, the indorser without recourse would not be liable to subsequent holders, because, not being able to sue him on his indorsement, they could make no use of the estoppels. And it would seem that such a result is the one intended by the parties and accords with the popular interpretation of a qualified indorsement. Nevertheless, if the reasoning suggested above in the discussion of Section 66 be sound (and it seems to be the only reasoning by which a warranty can be extended to subsequent holders) the framers of the act would have been strangely inconsistent had they limited the warranty of the indorser without recourse to his immediate indorsee. A. indorses "without recourse" to B. It is everywhere the law that B. could still sue A. for a breach of warranty, which is a collateral agreement incident to the sale of the instrument. Suppose B. indorses to C. *If the warranty is assigned by the indorsement,* C. could sue A. in case the warranty were broken. Moreover, the same result would follow if B. indorsed "without recourse" to C., for the qualification cannot possibly do more than curtail B.'s liability and cannot be construed as curtailing C.'s rights against parties prior to B.

Next we notice that by Section 65 the warranty of the transferrer by delivery extends only to his immediate transferee. This is a codification of what has always been the law, but, as Professor Ames remarks, if the indorser "without recourse" is liable to subsequent holders for a breach of warranty, why not also the transferee by delivery? Undoubtedly the liability of the two has always been supposed to be identical. The only answer is that the transferee not having *indorsed* the instrument to a subsequent holder, there has been no assignment of the warranty.

Professor Ames makes a further criticism on this same point.

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[1] Professor Ames cites one case squarely in point which sustains his view. Watson *v.* Chesire, 18 Iowa, 202, 1865. There seems to be no case in point the other way, although in three New York cases a point was decided which indicates that indorsers without recourse would there be held liable to subsequent indorsees. Herrick *v.* Whiting, 15 Johnson, 240, 1818; Shaver *v.* Ehle, 16 Johnson, 201, 1819; Baskin *v.* Wilson, 6 Wendel, 474. Two of these cases held that when a maker is sued by a transferee remote from the payee who indorsed without recourse, the payee is incompetent to testify on behalf of the plaintiff for the reason that he is an interested party and by proving the plaintiff's case would be relieving himself from liability on his implied warranty to the plaintiff.

Turning to the warranties of one who indorses without qualification, he points out that "an accommodation indorser is obviously not a vendor. The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as indorser upon the bill after maturity and due notice of dishonor." [1] Yet, by Section 66, the accommodation indorser is liable as a warrantor. Here, again, the difficulty is to justify the provision of the act on the theory of warranty. As an estoppel, the matter would be simple enough. The very indorsement of the accommodation indorser should preclude him from setting up that the bill is not genuine or that prior parties had no capacity to contract, facts which are wholly inconsistent with his contract of indemnity. But on what legal principle he can be saddled with the *warranties of a vendor* is far from clear.

As to extending the warranties of the indorser to subsequent holders, therefore, the gist of the matter seems to be this: The result reached in Sections 65 and 66 are in the main just. The only possible objections would seem to be that the accommodation indorser [2] should not be subject to suit till after maturity, and that the warranty of the indorser "without recourse" should extend only to his immediate indorsee. Certainly with these two exceptions, the results reached are those which have long been the law. But the rules are stated in terms which are difficult to justify on any legal theory.

Professor Ames makes a further and a different criticism of these two sections. "The transferrer by delivery or by a qualified indorsement not only warrants, in Section 65, paragraphs 1, 2, and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by Section 65, par. 4, "that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Why, asks Professor Ames, should his knowledge be irrelevant in the case of forgery or capacity of prior parties and yet be essential when the instrument is invalid because of usury or other statutory real defence, or if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence?

There is much force in the criticism. Subsection 65, par. 4, is

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[1] Central Bank *v.* Davis, 19 Pick. 373; Sus. Bank *v.* Loomis, 85 N. Y. 207; Case *v.* Bradburn, 1 Daly, 256.

[2] If the accommodation indorser is a warrantor, he may be sued before maturity This changes the law. See cases cited in preceding note.

evidently a codification of the New York case of Littauer *v.* Goldman,[1] which held that a defendant who transferred by delivery to the plaintiff a note tainted with usury in its inception, of which defect, however, the defendant was ignorant, could not be held liable on an implied warranty. The court, after reviewing a number of cases, concludes that there are only two implied warranties in the transfer of negotiable paper, namely, a warranty of title, and a warranty that the instrument is genuine and not forged. That case is "admittedly supported by no precedent,"[2] and there are decisions flatly against it.[3] As Chief Justice Shaw said, in Lobdell *v.* Baker,[4] "Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties; but he has the right to believe, without inquiring, that he has the *legal obligation* of the contracting parties appearing on the bill or note." That was a case of infancy, but the remark is equally applicable to a note tainted with usury in its inception. For in the latter case the indorsee does not get that *legal obligation* for which he contracted. It would seem, therefore, that the transferrer should be held liable for a breach of warranty since the thing sold is not what it purported to be. Furthermore, as the critic points out, if "scienter" is necessary in the case of the indorser without recourse, why is it not equally necessary in the case of one who indorses without qualification? Yet Section 65, par. 4, is not incorporated by reference in Section 66.[5]

Section 68:

> "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. *Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.*"

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[1] 72 N. Y. 506.

[2] Wood *v.* Sheldon, 42 N. J. 421. It is also disapproved of in Meyer *v.* Richards, 163 U. S. 385 (pages 411 and 412).

[3] Giffert *v.* West, 33 Wis. 617; Daskam *v.* Ullman, 74 Wis. 474; Hannum *v.* Richardson, 48 Vt. 508; Knight *v.* Lanfear, 7 Rob. (La.) 172.

[4] 3 Met. 469.

[5] Professor Ames proposes as a substitute for Section 65–4 "that the instrument is subject to no real defence, nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." In the opening of his first article, Professor Ames justly remarks that the new code would have gained in simplicity and arrangement had due emphasis been given to the distinction between real and personal or equitable defences.

Professor Ames thinks that the last sentence — which introduces a change into the law — is a blunder which should be cancelled. He says, "Joint makers, joint drawers and joint acceptors are liable only jointly. Why this arbitrary distinction?"

Judge Brewster replies that the change was made for convenience' sake, and that it "is in accord with the theory of the law already established in most of the states which adopted the reform procedure, say three-fourths of the states of the union." [1] Mr. Arthur Cohen also thinks that this change is an improvement. "by reason of its sweeping away certain technicalities. There has always been a tendency in the law merchant to consider contracts which are in form joint contracts as being intended to be joint and several." Still, Professor Ames' query "Why this distinction?" remains unanswered. If joint indorsees are to be liable jointly and severally (and it would seem that they ought to be), why not joint drawers also? Instead of cancelling the latter part of this section, however, would it not have been better to widen its scope and include joint drawers, joint makers, and joint acceptors?

Section 70:

> Section 70 provides that "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument." [2]

This, says Professor Ames, changes the law and for the worse as to certificates of deposit. The weight of authority, represented by the leading commercial states,[3] is that they must be presented to charge the bank. Five states hold that presentment is not necessary.[4] Furthermore, under this section, "presentment would not be necessary in the case of bank notes circulating as money." The critic suggests that the words "except in the case

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[1] Referring to 2 Bliss 53, Pomeroy, 2d Edition, 326, Conn. Rules of Practice, page 1, Sec. 2. For the American statutes see Randolph's Commercial Paper, Sec. 1669.

[2] The remainder of the section reads, "but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

[3] Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, Vermont.

[4] California, Iowa, Michigan, Minnesota, Wisconsin.

of bank notes and certificates of deposit " should be inserted after the word " necessary " in the first line.

Of course, this section was intended to apply to the maker of a note and acceptor of a bill. Evidently, from Judge Brewster's reply, the point as to certificates of deposit did not occur to the Commissioners. His defence is, " In view of the fact that no person would be likely to bring a suit on such instruments when he could get the money at the bank, and the further fact that no harm could come to the promiser excepting as to costs, which are in most, if not all the states, subject to the discretion of the court, the objection does not seem to be practical."

1. The numerous reported cases of suits brought on certificates of deposit dispose of the first part of that defence.

2. " No harm could come to the promisor excepting as to costs." All right. But how about the promisee? If no presentment is necessary, the holder's right of action accrues on the date of the certificate, and the statute of limitations runs from that date.[1] It follows that after six years the holder cannot get his money. This result is unjust. Nor is it a true answer to say that such a holder, like the holder of a demand note, has slept on his rights by allowing six years to slip by. He has not. Business custom determines such a question, and the fact is, as everyone knows, that by the custom of merchants the holder of a certificate of deposit is a *depositor*, who, like any other depositor, may leave his money in the bank for an indefinite period. The idea that he must withdraw it within six years would be a novel one to a banker So Section 70, in so far as it applies to certificates of deposit, not only ignores the language of such instruments, which always is that the money shall be paid " on the return of this certificate," but, by barring the holder's right of action after six years from the date of the certificate, runs counter to the understanding of the business community, which regards such an individual as a *depositor*.

It is not likely that much harm will result from this section, as the use of certificates of deposit is very limited and appears to be decreasing. Nevertheless, the framers of the act slipped up on this point.

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1 In states where right of action accrues on date of certificate, statute runs from that date. When action accrues only after demand, statute runs from date of demand. For collection of authorities see Am. and Eng. Encyc. of Law, 2d Edition, 804.

Section 119:

"A Negotiable Instrument is discharged:

"1. By payment in due course by or on behalf of the principal debtor;

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"3. By the intentional cancellation thereof by the holder;

"4. *By any other act which will discharge a simple contract for the payment of money;*

"5. When the principal debtor becomes the holder of the instrument, at or after maturity in his own right."

Professor Ames criticises the fourth paragraph of this section. He says, "If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if the holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course."

Judge Brewster's answer is, "The section evidently relates to acts between the parties. If the maker allows his note to remain outstanding, and so to be transferred, of course he should be held liable." "This," as Professor Ames says, "is very sound law, but, with all deference, this sub-section declares just the opposite. The language is that by such an accord and satisfaction 'a negotiable instrument is discharged.' If it is discharged, the maker can never be charged upon it. In all the other sub-sections of this section the discharge is complete and final."

The critic seems to have the best of it. Payment of a note before maturity is no defence against a holder in due course. That has always been the law. But a simple contract claim is discharged by payment before the claim is due, and now comes Section 119 and says that such a payment discharges a negotiable instrument. The Judge's only answer is that this section "evidently relates to acts between the parties." 1. What is meant by "acts between the parties"? 2. Why does this section evidently relate only to such acts?

Mr. Farrell makes a curious answer to this criticism. He says that Professor Ames is "construing the language of one of the

component parts of a section without reference to its connection with the others. The section declares that an instrument is discharged: by payment by the principal debtor; by payment by the accommodated party; by the holder's intentional cancellation, and (4) 'by any other act which will discharge a simple contract for the payment of money,' *i. e., any other act* which will discharge a negotiable instrument, which is but a simple contract for the payment of money, as distinguished from a specialty, in the extinguishment of which the same formality is required that is necessary to its creation. Do the other sub-sections, specifying the methods of extinguishment, refer to negotiable instruments, or to some other form of contract?"[1]

Let us see. In the first place, Mr. Farrell misstates Subsection 1. It does not read "By payment by the principal debtor." It reads, "By payment *in due course* . . . by the principal debtor." That makes a difference. Now, Subsection 4 reads "*By any other act* which will discharge a simple contract for the payment of money." *I.e.,* any act other than the acts specified in Subsections 1, 2, and 3. But payment *before maturity* is not within the acts specified in Subsections 1, 2, and 3, and it is an act which discharges a simple contract for the payment of money. Therefore by Subsection 4, payment before maturity will discharge a negotiable instrument.

But Mr. Farrell says that Subsection 4 ("By any other act which will discharge a simple contract for the payment of money") means "*any other act which will discharge a negotiable instrument*, which is but a simple contract for the payment of money, as distinguished from a specialty, in the extinguishment of which the same formality is required that is necessary to its creation." Now, with all deference! The purpose of Section 119 was to answer this question, "What acts will discharge a negotiable instrument?" To say that the answer given is "A negotiable instrument is discharged by acts 1, 2, 3, and *any other act which will discharge a negotiable instrument*" is to say that Mr. Crawford and the Commissioners had lost their wits. It reminds one of the celebrated excuse for drinking:

> "If I the reasons well divine,
> There are just five for drinking wine:
> Good wine, a friend, or being dry,
> Or lest you should be by and by,
> *Or any other reason why.*"

[1] The Negotiable Instruments Law, by John L. Farrell, Brief of Phi Delta Phi, Vol. III, No. 2, First Quarter, 1902.

Perhaps a negotiable instrument is "a simple contract for the payment of money, as distinguished from a specialty." But it is certainly true that it is *negotiable*, and in this respect differs from all other simple contracts for the payment of money. From this *negotiability* arise certain rules not applicable to non-negotiable contracts for the payment of money. At least one of these rules relates to the discharge of a bill or note, and Professor Ames' illustration shows that Subsection 119, par. 4, goes too far in that it practically places the discharge of a negotiable instrument and the discharge of a non-negotiable simple contract for the payment of money on the same footing.

Why Subsection 119, par. 4, was inserted does not appear. As Professor Ames says, "It would be superfluous even if it were accurate." It has no counterpart in the English act, nor apparently in any other existing code. Mr. Crawford's Annotation, which usually gives the cases upon which each section is based, is silent as to 119, par. 4. But that this subsection will be permitted to upset such a rule as that which declares that payment before maturity is no defence against a holder in due course, is unbelievable, though it must be confessed that in limiting its meaning, the courts will probably have to proceed on the ground that any other interpretation would be revolutionary, unjust, and absurd.

Section 120, par. 3:

> "A person secondarily liable on the instrument is discharged:
>
> "(3) By the discharge of a prior party."[1]

"This subsection," says Professor Ames, "is the most mischievously revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all

[1] The entire section reads:

"A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. *By the discharge of a prior party.*
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

the indorsers are *ipso facto* discharged. It means that if a joint note is executed by 'A., principal,' and 'B., surety,' and B. dies, whereby the whole burden survives to A., all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of Section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy." [1]

Judge Brewster's reply is that Subsection 3 means only the discharge of a prior party *by the holder*, and to show this he argues:

1. The other paragraphs of Section 120 refer to acts of the parties, not to acts of law.

2. In none of the ten books on commercial paper published since the new act was legislatively adopted, is there a suggestion that Subsection 120, par. 3, changed the law.

3. That two or three text-books state the law in words practically the same as those used in Subsection 120, par. 3.

4. It is a rule of statutory construction that in statutes or revisions condensing or in general restating the common law, no change is presumed except by the clearest and most imperative implication.

Judge Brewster thinks that the critic is unjust in trying to read

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[1] This section, which has no counterpart in the English act, seems to have been developed out of the New York case of Shutts *v.* Fingar, 100 N. Y. 539, 1885. In Merritt *v.* Todd, 23 N. Y. 28, 1861, the New York court laid down the rule that in order to charge the indorser of a demand note in New York, it is not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time Merritt *v.* Todd was followed by later New York cases, though it has now become obsolete through the adoption by New York of the Negotiable Instruments Law, which provides that an instrument payable on demand must be presented within a reasonable time after issue. "In Shutts *v.* Fingar the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of Merritt *v.* Todd, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that the presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of Subsection 3. Since Merritt *v.* Todd has become obsolete through the adoption of the Negotiable Instruments Law, Shutts *v.* Fingar is now nothing more than a legal curiosity." And see, also, Crawford's An. N. I. L. 84, notes A and C.

into Subsection 3 the words "by operation of law." Professor Ames retorts that Judge Brewster is trying to read into this subsection the words "By the holder." Furthermore, says the critic, if the words "by the holder" are to be read in, this subsection will apply to only one case which is not already covered by the other paragraphs of this section, and in that one case it works injustice. A. makes a note for the accommodation of B. If the holder, with knowledge of the accommodation, releases A., this subsection would discharge B., the accommodated indorser. Yet the decisions are the other way,[1] and rightfully, for the action of the holder in releasing A. has not prejudiced B., since the latter could not, on paying the holder, have any right over against the accommodation maker.

The rather lame answer given amounts to this: If all that is true, what possible harm can Subsection 120, par. 3, do, except to discharge the indorser in the case you suppose?

The subsection says simply "By the discharge of a prior party." That would seem to mean *any discharge;* a discharge by operation of law, or a discharge by the holder. If the Commissioners meant only the latter (and of course that is all they did mean), why did they not say so? It is to be earnestly hoped that the courts will adopt Judge Brewster's interpretation. It is to be as earnestly regretted that the Commissioners did not express themselves unmistakably on so important a point.

Professor Ames also criticises paragraphs 5 and 6 of Section 120, which read:

> "5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
>
> "6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

They are inaccurate, he says, in point of law. "If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time,

[1] Collott *v.* Haigh, 3 Campbell, 281; Hill *v.* Read, D. & Ry. N. P. 26; Sargent *v.* Appleton, 6 Mass. 85; Parks *v.* Ingram, 22 N. H. 283; and see also Ludwig *v.* Iglehart, 43 Md. 39; Gloucester Bank *v.* Worcester, 10 Pick. 528; Bruen *v.* Marquand, 17 Johnson, 58.

does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for, under no circumstances, would they, on paying the holder, have any right, either by subrogation or indemnity, against the accommodation acceptor or maker."

Professor Ames assumes that both these subsections have to do with releasing or giving time to "the person primarily liable." Possibly there is room for doubt as to that. Subsection 5 speaks of "the principal debtor." Now the person "primarily liable" on the instrument is the person who, by the terms of the instrument, is absolutely required to pay the same; whereas, by the words "principal debtor" we usually or at least very frequently mean the person ultimately liable for the amount of the instrument. If A. makes his note for B.'s accommodation, A. is "primarily liable," for, by the terms of the instrument, he is absolutely required to pay the same, but B., the accommodated payee, is "the principal debtor" who must ultimately foot the bill. On the other hand, paragraph 6 evidently refers to an extension of time given to the person "primarily liable." Now, if Subsection 5 refers only to a *release* of "the principal debtor," Professor Ames' illustration of the accommodation note is not in point, because the accommodated indorser would not be discharged by a *release* of the accommodation maker, the latter not being "the principal debtor." But by Subsection 6 an *extension of time* given to the accommodation maker would discharge the accommodated indorser.[1]

Assuming, however, that Professor Ames is correct in supposing that both Subsections 5 and 6 apply to *the person primarily liable on the instrument,* even though he may not be *the principal debtor,* his illustration shows that these subsections are not wholly satisfactory.

Judge Brewster's reply admits that the cases dealing with the point raised by Professor Ames' illustration are sound, but says that they are not disturbed by the Negotiable Instruments Law, for "The law is intended to set out the legal liability on the instrument as such, in the due course of commercial transactions. It could never be held to mean that a party who had paid money

[1] But the cases on this point make no distinction between releasing an accommodation maker or acceptor and giving him an extension of time. See cases cited in preceding note. Nor does there appear to be any reason for making such a distinction.

for another's accommodation could not at law, if not on the instrument, recover it back. That is a matter between the parties, entirely outside of the effect of the instrument in the hands of a holder."

The answer is scarcely responsive, as Professor Ames is talking about taking away from the holder his right against the accommodated indorser, and not about a person's right to recover money paid for another's accommodation; but evidently Judge Brewster's idea is that the act is dealing solely with the *discharge of the instrument*, and does not discharge any other actions at law that the parties may have. That is true, but it furnishes no reason for denying an action on the instrument whenever an action on the instrument should lie. Moreover, if the holder, in Professor Ames' illustration, took the note *in absolute payment of a debt*, what rights would he have against the accommodated indorser after the latter is discharged from liability on the note?

Finally, Professor Ames objects to Subsections 5 and 6 as the superfluous introduction of doctrines of suretyship into a negotiable instruments code, and if these are to be introduced, he thinks that other doctrines of suretyship of equal importance should be inserted, as, for instance, the doctrine that the accommodation maker or acceptor, although the party primarily liable on the instrument, will be discharged if the holder, with knowledge of the accommodation, releases or undertakes to give time to the accommodated drawer or indorser.

Section 124:

> "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.
>
> "But when an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor." [1]

[1] Section 64 of the English Bills of Exchange Act reads,

"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

"*Provided*, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

The criticism of this section is contained in a note published subsequent to the articles in the Harvard Law Review and is based upon the case of Jeffrey *v.* Rosenfeld,[1] decided by the Supreme Court of Massachusetts in September, 1901.

At the common law, the material alteration of a negotiable instrument without the assent of all parties liable thereon avoided the instrument except as against a party who made, authorized or assented to the alteration, and subsequent indorsers. The rule applied to an alteration made by a stranger as well as to an alteration made by a party to the instrument. Section 64 of the English act perpetuates the common law rule with the exception of a proviso inserted for the benefit of a holder in due course, under which he may enforce, according to its original tenor, a bill which has been materially altered, if the alteration is not apparent. The proviso, however, does not concern us in this discussion.

The American courts early changed the common law rule to the extent of holding that an alteration made by a *stranger* was a mere spoliation or trespass, and that the holder could still enforce the instrument in its original form. Now Section 124 of the American act is practically the same as Section 64 of the English act. Therefore, says Professor Ames, we are in this dilemma: "Either the English and American sections, although expressed in the same terms, must be interpreted differently, or else the American law is changed, and, as it seems to the writer, for the worse. To avoid the second horn of the dilemma involves great straining, not to say perversion, of simple English words."

How one can see any ambiguity in Section 124 is a mystery. It reads, "When a negotiable instrument is materially altered . . . it is avoided," etc. An alteration made by a stranger is not excepted, and certainly it is none the less an alteration because made by a stranger. To say that such an alteration is not covered by Section 124 would be, as Professor Ames says, "a great straining, not to say perversion, of simple English words." Judge Brewster agrees with the critic on this point. The only person who has ever suggested a doubt as to the meaning of this section is Mr. Justice Morton, who wrote the opinion in Jeffrey *v.* Rosenfeld, *supra*. In that case, a note secured by a mortgage was altered, though by whom did not appear. On a bill in equity to restrain the foreclosure of the mortgage, the court sustained the holder's right to foreclose without interpreting Section 124 of the

[1] 61 N. E. R. 49.

code, though Justice Morton, in an *obiter dictum* of some length, remarked that the question of its interpretation was one that deserved serious consideration. After referring to the authorities in this country which decided that a material alteration made by a stranger will not avoid the instrument, he adds, "It would seem not unreasonable to suppose that it was the intention of the framers of the American act that Section 124 should be construed according to the law of this country, rather than that of England." As a generality, that remark is profoundly true and applies to all the sections of the new act. They should be construed according to American law rather than English law. As applicable to the particular point under discussion, however, the remark is of small value. If the language of Section 124 is clear and unmistakable, it should be given its plain meaning. To construe it according to American law does not mean to knock it down simply because it changes American law somewhat. The learned Judge points out no ambiguity in the language of this section. His sole reason for doubting its very plain meaning is that it changes the law. As a matter of fact we learn from Judge Brewster that it was intended to change the law; that Mr. Crawford reported to the Conference in 1896 in favor of adopting the common law rule as to alterations by a stranger, in order that the law of the two countries might be uniform on this important point, and in order that the benefit of written evidence might be preserved. This view was approved by the Conference, and Section 124 was inserted to restore the English rule.

Professor Ames thinks that the change is for the worse, though he vouchsafes no reasons. Under such circumstances, the profession cannot be blamed for accepting without question the judgment of the learned and experienced experts who drafted the new act. But at all events, there is no ambiguity in this section. Its meaning is unmistakable.

Section 137:

> "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

Says Professor Ames, "A refusal to accept is an acceptance! Such a perversion of language would be strange enough any-

where, but in a deliberately framed code is wellnigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and against the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill."

How the holder could bring concurrent actions is not clear. He may sue the drawee, for under this section the latter is deemed to have accepted. But how could he proceed "against the drawer because of the drawee's non-acceptance"? The drawee "is deemed to have accepted." In legal effect, therefore, he has accepted, and so the holder must wait until the bill is dishonored for *non-payment*, before a right of action accrues against the drawer.

Mr. Cohen also disapproves of Section 137, though on another ground, namely, that this section "would seem to imply that if a bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This is not in my opinion the law, and ought not to be the law." There is force in this objection. By destroying the instrument or refusing to return it to the holder, the drawee surely indicates that he does not propose to honor it. It would seem that the drawer should be instantly apprised of this in order that he may proceed at once to recover the funds that he has placed in the drawee's hands. And if the destruction of a bill amounted to a dishonor of it, the drawer would have that right, but by regarding it as an acceptance all actions are postponed until after the day of maturity.

The idea that the wrongful retention or destruction of a bill by the drawee to whom it had been presented for acceptance, is of itself an acceptance, seems to have been introduced in 1808 by Lord Ellenborough in the case of Harvey *v.* Martin.[1] He reiterated that view in a dissenting opinion in Jeune *v.* Ward,[2] but the majority decided otherwise, and held that such a destruction or refusal to return, while rendering the drawee liable for conversion, was not an acceptance. Jeune *v.* Ward settled the English law on this point, and it has never been changed. On principle, that decision seems to be correct, and the view there expressed is

[1] 1 Campbell, 425 n.

[2] 2 B. & A. 653, 1818.

approved by such commentators as Bayley, Chitty, Story, Parsons, Daniel and Tiedeman,[1] all of whom regard the idea that the retention or destruction of a bill amounts to an acceptance, as illogical and quite unnecessary.

Mr. Farrell, in defending Section 137, recalls the rule that the holder of an instrument may join the drawer and drawee in the same action, and points out that if he were restricted to an action for conversion against the drawee, that action sounding *in tort* could not be joined with the action *ex contractu* against the drawer. Whether the advantage which results from the simple fact of joining the two actions will compensate for dispensing with the necessity of notifying the drawer of the refusal to return the instrument or the destruction thereof, and for adopting a rule so questionable on principle, may be seriously doubted. One never views without concern the insertion of a pure legal fiction in a statute.

But the rule adopted is far from being without support. By the New York statute, from which this section of the code is copied, "every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted to the holder, shall be deemed to have accepted the same."[2] And several states have substantially copied the New York statute.[3]

Judge Brewster says that from all these states came the report that this provision "'had worked well.' The bankers regarded it as a simple, practical, definite, working rule." Probably, therefore, we are justified in hoping that it will "work well" in the Negotiable Instruments Law.

Section 175:

> "Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to,

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[1] Bayley on Bills, Chapter vi, Sec. 1; Chitty on Bills, star page 296; Story on Bills, Sec. 248; 1 Parsons, 285; 1 Daniel's Negotiable Instruments, Sec. 500; Tiedeman on Commercial Paper, Sec. 224.

[2] 2 Rev. St. of N. Y. (6th Ed.) 1161. Though it was decided that under this statute the holder, in order to recover, must prove a conversion of the bill. Matteson *v.* Moulton, 79 N. Y. 627.

[3] Alabama, Arkansas, Idaho, Kansas, Nevada, Washington, California.

> both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter." [1]

When a bill has been protested for non-payment, a third person — who may or may not be a party to the bill — may intervene and pay the bill for the honor of any party or parties thereto. The payer for honor is then, by Section 175, subrogated to the rights of the holder as regards the party for whose honor he pays, and all persons *liable to the latter*. Suppose A. draws on B. and the latter accepts for A.'s accommodation. The bill is dishonored and X. pays it for the honor of the drawer. Since B., the accommodation acceptor, would not be liable to the accommodated drawer in case the latter took up the bill, X., the payer for honor, cannot, under this section, sue B. He may sue only A. and all parties *liable* to the latter.

This rule was laid down in 1808 by Lord Erskine in *Ex parte* Lambert.[2] For many years that case was everywhere regarded as an authority. No text writer doubted its soundness, and the only two American cases in which the point has been raised,[3] decided in 1835 and 1846, followed Lord Erskine without hesitation. But in *Ex parte* Swan,[4] decided in 1868, Malins, V. C., condemned the doctrine of Lord Erskine and laid down the opposite rule, viz., that the payer for honor should be subrogated to the rights of the holder against the party for whose honor he pays, and all parties *prior to* (not liable to) the latter. In 1882, however, the English code enacted Lord Erskine's rule. Professor Ames says that this was evidently a mere oversight. "Mr. Chalmers, in his excellent treatise, is careful to indicate every instance in which the English act modifies the previous law, but he gives no intimation that Section 68–5 introduced any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest,[5] published four years before the passage of the English act, in which he defines the right of the payer for honor in substantially the same language as that of the act. Mr. Chalmers' statement of the result of the

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[1] This section is identical with Section 68–5 of the English Act.

[2] 13 Ves. 179. Disapproving of the contrary view expressed in *Ex parte* Wackerbath, 5 Ves. 574, 1800.

[3] Gazzam *v.* Armstrong, 3 Dana [Ky.], 554, 1835; McDowell *v.* Cook, 6 Smed. & M. [Miss.] 420, 1846; and see Sharswood's Edition of Byles on Bills, 406 n.

[4] L. R. 6 Eq. 344–365.

[5] Page 192.

decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his table of cases overruled, he includes *Ex parte* Lambert as overruled by *Ex parte* Swan."

Of course it is possible, though scarcely likely, that when Judge Chalmers published his Digest in 1878, he overlooked the fact that *Ex parte* Lambert had been overruled by *Ex parte* Swan. It is scarcely believable, however, that the experts who revised Judge Chalmers' original draft of the Bills of Exchange Act, who certainly had both cases before them, should have been unconscious of the fact that they were codifying the overruled decision. The probable, natural, and reasonable explanation is that they preferred the doctrine of Lord Erskine to the doctrine of Chancellor Malins. However this may be, Lord Erskine's doctrine has certainly been the law for twenty years last past in England, and it is the doctrine laid down in the only two American cases on this point. Therefore, when one criticises the American Commissioners for not digging up the rule of *Ex parte* Swan, it would seem to be incumbent on him to show very clearly that *Ex parte* Lambert is wrong and *Ex parte* Swan right. It is true that the latter rule prevails in the codes of Germany and France,[1] and that it formerly prevailed in the California code.[2] Beyond this, Professor Ames presents nothing in support of it. As a matter of fact, it is far from clear that the rule of the American and English acts is not the better of the two. It certainly lessens litigation, for if the payer for honor may sue the accommodation acceptor the latter will then proceed against the accommodated drawer. Aside from this, there seems to be justice and common sense in the view that when X. steps in and pays for A.'s honor a bill on which the latter is liable as drawer, X. should be regarded (except as to his undoubted right to reimbursement from the man whose debt he has paid), as having stepped into A.'s shoes, and therefore should have only those rights which A. would have had in case he had paid his own debt.

Section 186:

"A check must be presented for payment within a reasonable time after it is issued, or the drawer will be discharged

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[1] French Code de Commerce, Art. 159. German Wechselordnung, Sec. 63. Translated in 3 Randolph's Commercial Paper, 2d Edition.

[2] Sec. 3205, 3 Randolph's Commercial Paper, 2d Edition.

from liability thereon to the extent of the loss caused by the delay." [1]

No similar provision is made for the effect of not giving due notice of dishonor when the check has been presented but not paid. Now Section 185 provides that "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." Therefore the effect of a failure to give due notice of dishonor to the drawer of a check must be governed by Section 89, under which delay in giving notice of dishonor to the drawer of a bill absolutely discharges him, although the delay has not caused him any loss. In other words, delay in presenting a check for payment discharges the drawer from liability thereon only to the extent of the loss caused by the delay, but delay in giving the drawer notice of dishonor absolutely discharges him. Yet the Courts and the text writers give the same effect to delay in presenting a check and delay in sending notice of its dishonor.[2] In both cases the drawer is discharged only to the extent of the loss caused by the delay. That is Professor Ames' objection to this section.

Judge Brewster shifts his ground somewhat in replying to this criticism. In his first paper he seems to admit that delay in notifying the drawer of a check will absolutely discharge the latter, and says, "Suppose it is so, technically, with reference to the check itself. What is the harm? The debt is not discharged, except for laches. The holder can sue on his debt just the same as he could have done before the check was given. . . . The section seems to be harmless in any view."

Professor Ames disposes of that answer as follows: "In all other cases a creditor who, by his laches, discharges his debtor from liability on a bill given in conditional payment of a debt, forfeits also all right to the debt. Furthermore, suppose a check to be given in absolute payment of the drawer's debt, or in consideration of the payee's release of a claim against a third person. Surely in either of these cases, the holder who loses his right on the check, has lost everything."

Then in his second paper, Judge Brewster claims that, "Since

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[1] This provision is copied from Section 74 of the English act.

[2] Clark *v.* Nat. Bank, 2 MacArthur, 249; Griffin *v.* Kemp, 46 Ind. 172; Gregg *v.* George, 16 Kan. 546; Stewart *v.* Smith, 17 Ohio St. 82; Purcell *v.* Allemong, 22 Grat. 739; *In re* Brown, 2 Story, 502; Story, Prom. Notes, 493; Dan. Neg. Inst. (4th Edition) 1587; 2 Benj. Chal. (2d Edition) 270.

the only penalty for delay in presentment (186) is the loss occasioned by delay, and *not* a discharge, the natural inference therefrom would be that the same exceptional exemption as to checks would continue in case of non-payment, namely, that the only penalty would be the loss occasioned by the delay, and *not* any absolute discharge, as claimed by the Dean." All admit that this ought to be the law, and again it is pertinent to inquire, "If the Commissioners meant that, why did they not say so?" A few short words would have settled the matter. Why, then, rely on "the natural inference"? Does the history of the making and interpreting of statutes vindicate the wisdom of relying on the courts to "infer" the right thing, or does it rather teach that the language of a statute cannot be too clear? And in this case it may not be such "a natural inference" after all, when the learned Chairman of the Conference which framed the act sees it only after second thought.

Judge Brewster regards Professor Ames' objections to this section as "the most truly academical criticism in the whole list." Evidently his reason for this view is that although the rules laid down in Sections 89 and 186 are copied from the English act, and have been repeated in all the cases and text-books since the first edition of Byles on Bills, no one has doubted during all this period that the same result flows from delay in sending notice of the dishonor of a check as from delay in making presentment. As to the cases and the text-books, that argument is worth little. Language used by a court must be construed with strict regard to the particular facts to which the language relates, and is authoritative only when so construed. Language used by a text writer is not authoritative at all, and is of little assistance even, unless construed with reference to the particular line of cases under discussion. Language used in a statute is read in a different light. An inaccuracy of statement which causes little confusion and no real harm in the opinion of a judge or in a text-book, may prove positively mischievous in a statute. But the fact that these same provisions have proved satisfactory in the English act for twenty years — while not disproving the objection that they are inaccurate — does indicate that little or no harm will result from that inaccuracy.[1]

[1] Mr. Farrell argues that Section 89 cannot refer to a check, because it provides that when an instrument has been "dishonored by non-acceptance or non-payment" notice of dishonor must be given. And he reasons that since a check need not be

This concludes the discussion. If it is permitted to offer a cautious generalization on this controversy, it is submitted that although Professor Ames has pointed out two or three actual errors in the new law and has shown that in still other instances the language might have been improved upon, nevertheless, these errors and imperfections are not sufficiently numerous or important to make one seriously doubt the advisability of adopting the Negotiable Instruments Law in every state in the Union. It is easy to lose one's perspective and sense of proportion in such a matter. The flaws in the act, few though they be, when grouped together and considered alone, seem formidable. Yet, when a survey is made of the entire statute, when one regards the many salutary provisions which settle disputed questions or introduce needed changes, when one studies the admirable simplicity and accuracy of most of its provisions and considers the comparative unimportance of most of the flaws which have been discovered, then the shortcomings of the Negotiable Instruments Law shrink to their real size and (though still apparent) do not seem likely to seriously impair its usefulness. It is unfortunate that the Commissioners did not have the benefit of Professor Ames' criticisms when they were revising the original draft of the act.[1] That some of them would have been adopted (to the benefit of the act) can scarcely be doubted. But the act having been started on its course and legislatively adopted in a number of states before these errors were discovered, it was decided, and no doubt wisely decided, that it was unnecessary and impolitic to start the work of amendment at that stage of its career. The readiness of several state legislatures to adopt the act in spite of the criticisms that have been made upon it and the very small amount of litigation that has arisen under it in jurisdictions where it has been in force for several years, have thus far vindicated the soundness of the Commissioners' decision.

Undoubtedly, however, Professor Ames has rendered substantial service to the Negotiable Instruments Law. He has pointed out the difficulties and possible dangers that lurk in some sections of it, and a careful study of his criticisms by those courts which will be called on from time to time to construe these sec-

presented for acceptance, Section 89 does not apply. The error is obvious. Section 89 reads, "dishonored by non-acceptance *or* non-payment." Therefore when a check is dishonored by non-payment, Section 89 does apply.

[1] Professor Ames saw the act for the first time after its adoption by four state legislatures.

tions, will serve to avoid some confusion and several unfortunate decisions. After all, many, if not most of the flaws in the act can be overcome by a careful construction.

Finally, the whole controversy should serve as a useful lesson to those who will in future direct the preparation of statutes codifying other branches of the law in this country. The Negotiable Instruments Law was originally drafted with the greatest care by a learned expert. It was then revised by a sub-committee of the Commissioners on Uniform State Laws, and was then revised by the Commissioners themselves at their annual conference. In addition to this, the statute, prior to its adoption by the Conference, had been brought to the attention of a number of experts generally throughout the country, and had received at least some consideration at their hands. Moreover, all who shared in the preparation of the act enjoyed the very great advantage of having before their eyes the English Bills of Exchange Act, which offered suggestions on every important point; afforded a constant opportunity for useful comparisons; whose provisions moreover could be examined in the light of twenty years' experience. In spite of all this, some errors (precisely how serious no one can say as yet) crept into the Negotiable Instruments Law which might have been avoided had the act, prior to its final revision, been subjected for several years to the most searching criticism obtained by giving to it the widest publicity and by soliciting the active cooperation of the considerable number of men whose thorough knowledge of the law of negotiable paper, whether from the standpoint of the banker, the practitioner, or the student, had fitted them to render valuable assistance in the preparation of a code on that subject. The two or three additional years consumed by pursuing this method would have yielded an ample return, and those who would object to the labor, expense, and time required by this method little appreciate the gravity and difficulty of the task of embodying the law in a series of authoritative, abstract propositions. Many will regard the shortcomings of the Negotiable Instruments Law as not very serious, but all may well remember that these shortcomings (such as they are) can probably be ascribed to the lack of adequate criticism.

CHARLES L. MCKEEHAN.

THE NEGOTIABLE INSTRUMENTS LAW— NECESSARY AMENDMENTS.[1]

BY JAMES BARR AMES.

THE Negotiable Instruments Law has been enacted in twenty states and the District of Columbia. There is reason to believe that it would have been adopted in some other states but for the criticisms of several of its provisions in earlier numbers of this Review.[2] In the American Law Register for August, September, and October there is a series of articles by Mr. Charles L. McKeehan upon "The Negotiable Instruments Law — A Review of the Ames-Brewster Controversy."[3] Whether readers agree or disagree with the reviewer's conclusions, all must recognize his ability, impartiality, and knowledge of his subject. This year most of the biennial legislatures meet, and attempts will be made to secure the enactment of the new code in additional states. It is quite possible that attempts will also be made to amend the Law in some states which have adopted it.

It is not the object of this paper to reiterate in detail former criticisms upon the new code. But, inasmuch as the reviewer of the Ames-Brewster controversy sustains the greater part of these criticisms,[4] it seems worth while to point out that the most serious defects in the new code are in those sections in which the codifiers departed from the model of the English Act, and to call attention to two sections in which the defects, though common to both Acts, not only change well-established American law, but also threaten serious injustice.

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[1] Reprinted from 16 Harv. L. Rev. 255.

[2] 14 Harv. L. Rev. 241, 442; 15 Harv. L. Rev. 26. These criticisms and the replies thereto by Judge Brewster in 10 Yale L. J. 84; 15 Harv. L. Rev. 26, together with a letter from Mr. Arthur Cohen, Q. C., to Judge Brewster, and the text of the Negotiable Instruments Law have been published in a pamphlet by the Harvard Law Review Publishing Association.

[3] 41 Am. L. Reg. 3, 499, 561.

[4] It is right to say that Mr. McKeehan has convinced the writer that his first objection to § 49 is fully met by the suggestion that the indorsement required of the transferor might in certain cases be a qualified indorsement. If the American courts would follow the Scotch precedent of Hood *v.* Stuart (Court of Sess. March 20, 1870) in which case the assignee of the accommodated payee was allowed without the aid of the latter's indorsement to charge the accommodating acceptor, his second objection to that section would disappear also. He must dissent, however, from Mr. McKeehan's view that the case of accommodation and the case of fraud are to be treated in the same manner. The reason for the distinction is clearly pointed out in the Scotch case.

The sections that would be wisely amended by making them uniform with the English Act are eight, namely, 20, 40, 65–4, 119–4, 120–3, 120–5, 120–6, and 137. The other two are sections 124 and 186.

SECTION 20 makes an agent, who signs his principal's name without authority, liable on the instrument. The decisions and text writers are almost unanimous against this doctrine,[1] which arbitrarily imposes upon the parties a contract which was not in the contemplation of anybody. It may work, too, very unjustly. It is right that the agent should be held to warrant his authority to act as agent, and made to answer to the other party for damages suffered by reason of his not getting the principal's obligation. But to make the ostensible agent liable for the face of the instrument, when the contemplated principal was insolvent, would give the holder unjust enrichment and impose an undeserved penalty upon such agent.[2] To amend this section, strike out in the fourth line the words "if he was duly authorized."

SECTION 40. Section 8–3 of the English Act, of which Sections 9–1 and 9–5 are a reproduction, was intended to supersede the doctrine of Smith *v.* Clarke,[3] by which an instrument indorsed in blank continued negotiable although subsequently indorsed specially.[4] But Section 40 revives Smith *v.* Clarke by enacting that "where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery." Mr. McKeehan endeavors to save this section by reading into it before the word "payable" the word "originally."[5] But this is inadmissible. Instruments payable to bearer are defined with

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[1] Hall *v.* Crandall, 29 Cal. 567; Lander *v.* Castro, 43 Cal. 497; Taylor *v.* Shelton, 30 Conn. 122; Duncan *v.* Niles, 32 Ill. 532; Seeberger *v.* McCormick, 178 Ill. 404, 417; Thilmany *v.* Iowa Co., 108 Iowa 357, 363; Noyes *v.* Loring, 55 Me. 408; Bartlett *v.* Tucker, 104 Mass. 336; Sheffield *v.* Ladue, 16 Minn. 388; Cole *v.* O'Brien, 32 Neb. 68; Patterson *v.* Lippincott, 47 N. J. Law 457, 459; White *v.* Madison, 26 N. Y. 117; Miller *v.* Reynolds, 92 Hun 400; Delius *v.* Cawthorn, 2 Dev. 90; Bryson *v.* Lucas, 84 N. C. 680, 683; Trust Co. *v.* Floyd, 47 Oh. St. 525; Hopkins *v.* Mehaffy, 11 S. & R. 126 (semble); Story, Ag. (9th ed.) § 764 a; Mechem, Ag. § 550; Huffcut, Ag. § 230; Reinhard, Ag. § 307.

In two or three states an agent who without authority signs "A. B. agent for C. D." is held liable on the instrument, everything after his own signature being ignored. Byars *v.* Doores, 20 Mo. 284; Weare *v.* Gove, 44 N. H. 196. But no case has been found in which A. B. signing simply the name of "C. D." was charged on the instrument.

[2] Re Nat. Co., 24 Ch. Div. 367, 372, 375.

[3] Peake, 225.

[4] Chalmers, Bills of Exch. Act (5th ed.) 24; Mr. Cohen's letter, 15 Harv. L. Rev. 37. *Supra*, p. 465.

[5] 41 Am. L. Reg. 461. *Supra*, p. 488.

great care in Section 9 as including several species of instruments. Wherever the generic term is used without qualification in another section, it cannot be limited to one of the species.[1] Furthermore, Mr. Crawford, the draughtsman of the new code, in his note to Section 40 cites Smith *v.* Clarke as if still law. So do the other commentators upon the Act.[2] Mr. McKeehan's suggestion is also opposed to the interpretation given to this section by Judge Brewster, the Chairman of the Committee on Uniform Laws. Section 40 should be expunged.

Section 65–4 introduces the novel distinction that a transferor by delivery is a warrantor of title and genuineness only to his immediate transferee while the similar warranty of the indorser without recourse runs to all subsequent holders. There is no authority for this arbitrary distinction.[3] The only decision on the point is against this distinction.[4]

Another new and unfortunate distinction is introduced by subsection 4, by which the transferor of an instrument void for usury is not liable as a warrantor, unless he was aware of the usury, whereas the transferor of an instrument void for coverture or voidable for infancy is liable as a warrantor, although he was ignorant of the coverture or infancy. This distinction is due to the anomalous decision in Littauer *v.* Goldman,[5] and the anomaly, already condemned in other jurisdictions,[6] should not be per-

[1] Section 9–1 reads: "The instrument is payable to bearer when it is expressed to be so payable." Mr. McKeehan understands this section to mean only instruments originally payable to bearer. Such was formerly the opinion of the writer. 14 Harv. L. Rev. 246. *Supra*, p. 423. But clearly it must apply to an instrument originally payable to order and indorsed by the payee expressly "Pay to bearer." Whether, therefore, an instrument is payable to bearer under each of the paragraphs of Section 9 would seem to depend upon the form of the instrument, not at the time of its creation, but at the moment of inspection. An instrument originally payable to order may become payable to bearer by an indorsement to bearer or by an indorsement in blank, and conversely an instrument originally payable to bearer may cease to be so payable by a special indorsement.

[2] Norton, Bills & Notes (Tiffany's ed.) 116; Huffcut, Neg. Inst. 24; 17 Bank L. J. 12 and 775; Selover, N. I. L. 189 n. 78, citing cases like Smith *v.* Clarke.

[3] The New York cases cited by Mr. McKeehan in 41 Am. L. Reg. 567, n. 12, in which an indorser without recourse was held to be incompetent to testify in an action by a remote holder against the maker, lend no support, it is submitted, to the notion that such an indorser was liable to the remote holder. He was incompetent even if not liable directly to the plaintiff, for if the plaintiff failed to charge the maker, he might proceed against his transferor, and the latter against his predecessor, and so ultimately the indorser without recourse might be sued by his immediate transferee.

[4] Watson *v.* Chesire, 18 Iowa 202.

[5] 72 N. Y. 506.

[6] Wood *v.* Sheldon, 42 N. J. Law, 421, 424; Meyer *v.* Richards, 163 U. S. 385 411, 412.

petuated in the Negotiable Instruments Law. In one class of cases the transferor's warranty is rightly limited by his knowledge of the facts at the time of transfer. If the instrument is not collectible by reason of the insolvency of prior parties, he warrants only his ignorance of such insolvency.[1] Section 65 should be amended so as to read as follows:

"Every person negotiating an instrument by delivery merely, or by indorsement, with or without qualification, warrants to his immediate transferee,

"1. That the instrument is genuine and in all respects what it purports to be.

"2. That he has a good title to it.

"3. That it is subject to no real defence, and, if the transfer is after maturity, that it is subject to no personal defence, in favor of any party to the instrument.

"4. That he has no knowledge of any fact which impairs its collectibility."[2]

Because of the amendment of Section 65, Section 66 should also be amended by cancelling everything after "qualification" in the first line to "engages" in the sixth line.

Section 119–4 provides that a negotiable instrument is discharged "by any other act which will discharge a simple contract for the payment of money." The acceptance of a chattel in satisfaction of an unmatured simple contract claim discharges it. Therefore such a satisfaction of a note before maturity must, according to this provision, discharge the note. This is a startling innovation, and doubtless to no one more surprising than to the framers of the Act. Mr. McKeehan recognizes the justice of the criticism upon this section.[3] The provision should be cancelled. It would be useless even if it were not mischievous.

Section 120–3. "A person secondarily liable on the instrument is discharged: — By the discharge of a prior party." If the word "discharge" is to receive its natural interpretation, standing as it does without any qualification, it must mean any

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[1] Cases cited in Chalmers, Bills of Exch. Act (5th ed.) 195, n. 1. See also Gordon *v.* Irvine, 105 Ga. 144; Brown *v.* Montgomery, 20 N. Y. 287 (seller of post-dated check knew that another check of drawer had just been dishonored).

[2] The words "impairs its collectibility" seem to be preferable to "render it valueless," the words of the Negotiable Instruments Law. The warranty should attach, if the instrument is worth fifty cents on the dollar. But such an instrument is not valueless.

[3] 41 Am. L. Reg. 573. *Supra*, p. 526.

kind of discharge whether by act of the parties or by operation of law. One secondarily liable would be discharged, therefore, if any prior party should be discharged by the Statute of Limitations, or if any prior indorser should be discharged by the holder's failure to give him due notice of dishonor, and, in jurisdictions where joint obligations are not made joint and several by statute, the death of a surety co-maker would discharge all subsequent parties. A provision producing such results is a legal monstrosity. The defenders of this subsection say that it applies only to a discharge by act of the parties. But Mr. Crawford in his note to this provision states that an indorser is discharged if the claim against the maker is barred by the Statute of Limitations.[1] The same view is advanced by the commentator in the Banking Law Journal.[2] If a holder appoints an indorser his executor, the law, regardless of the intention of the parties, discharges all subsequent indorsers.[3] Is this a discharge by operation of law or by the act of the parties?

But even if the operation of the subsection is limited to a discharge by the parties, it is mischievous. It would discharge the accommodated indorser if the holder, with knowledge of the accommodation, should release the accommodating maker. Judge Brewster concedes this. All possible mischief would be avoided and no loss suffered by cancelling this subsection.

Sections 120–5 and 120–6. No elasticity of interpretation can correct the errors of these subsections.[4] They declare in effect that a release of the giving of time to an accommodation acceptor or maker will discharge the accommodated drawer or indorser, and thereby overturn well-established doctrines of Suretyship. These inaccurate statements of the law of Suretyship should be eliminated.

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[1] Crawf. Ann. N. I. L. (2d ed.) 108. It appears from this note that this subsection was inserted to bring about this very result.

[2] 19 Bank. L. J. 402.

[3] Jenkins *v.* Mackenzie, 6 Up. Can. Q. B. 544; 4 Am. & Eng. Enc. of Law (2d ed.) 506, n. 6.

[4] It has been suggested that "principal debtor" in Section 120–5 may not be synonymous with "party primarily liable." But as the "principal debtor" is contrasted with the "party secondarily liable" the words must be used in the sense of "party primarily liable." Obviously the release in Subsection 5 and the giving of time in Subsection 6, in which the words "principal debtor" do not occur, are intended to have the same operation. See Mr. McKeehan's observations in 41 Am. L. Reg. *Supra*, pp. 530-532.

SECTION 137, treating a destruction or a withholding of a bill by the drawee as an acceptance, is worse than the writer at first supposed. He criticised it as objectionable in point of form. Mr. Cohen, in his letter to Judge Brewster,[1] and Mr. McKeehan [2] have made it clear that the section is erroneous in principle. If the drawee of a three months' bill presented to him for acceptance should, in a fit of anger at the drawer's presumption in drawing upon him, refuse to accept it and throw it in the fire, the holder, under this section, would have no remedy on the instrument against the drawer either on the bill or for the consideration for which the bill was given until after its dishonor by non-payment. As Mr. Cohen says: "This is not in my opinion the law, and ought not to be the law." This section should be expunged.[3]

Each of the amendments thus far recommended would remove a difference between the English and American codes. It remains to consider two sections whose amendments would introduce a difference between the two codes.

SECTION 124. By the English decisions a material alteration of an instrument, even by a stranger, nullified it. The American courts, deeming the English precedents repugnant to justice, declined to follow them, and decided that the holder should not forfeit his rights because of this wrongful act of a stranger. The Bills of Exchange Act codified the English decisions. The Negotiable Instruments Law, instead of codifying the American decisions, abandoned them, and restored the medieval doctrine of forfeiture. Other things being equal, uniformity between the American and English law is to be encouraged. But where it is a choice between uniformity and justice, American legislators ought not to hesitate to sacrifice uniformity. Upon the point of justice in this case the words of Mr. Justice Story may be cited: "The old cases proceeded upon a very narrow ground. It seems to have been held, that a material alteration of a deed by a stranger, without the privity of either obligor or obligee, avoided the deed; and by parity of reasoning the destruction or tearing off the seal either by a stranger or by accident. A doctrine so

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[1] 15 Harv. L. Rev. 38. *Supra*, p. 465.

[2] 41 Am. L. Reg. 583. *Supra*, pp. 534-536.

[3] This section is objectionable for another reason. A drawee, who destroys the instrument, is properly liable to the holder for its collectible value, as in any case of conversion of a bill. But the fictitious acceptor, under this section, must pay the payee the face value of the bill, although the drawer is hopelessly insolvent.

repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority, before a Court of law is bound to surrender its judgment to what deserves no better name than a technical quibble." [1] The section should be amended by adding after the word "altered" in the first line the words "by the holder." It is believed that it would be advisable also to insert before the word "materially" in the first line the words "fraudulently and."

Section 186 together with Section 89 provides that the drawer of a check is absolutely discharged by the holder's failure to give him due notice of its dishonor although the laches has not caused any loss to him. This section changes well settled law, and for the worse. Fortunately cases presenting the facts here supposed are not likely to be frequent. But this will be small consolation to the particular plaintiff when the case does arise.

To sum up, Sections 20, 65–4, 119–4, 120–3, 120–5, 120–6, and 137 are obnoxious to these three objections. They introduce unnecessary distinctions between the English and American codes. They nullify generally established and well-approved doctrines of the American and English courts. They are sure to provoke needless litigation and to cause much injustice.

Section 40 is open to the first and third objections, and furthermore nullifies the wholesome innovation of Section 9–5.

Section 186 is opposed to the American and English precedents and is doubtless due to an inadvertence of the American and English codifiers.

Section 124 is a return to archaic formalism, and the language of Judge Story, already quoted, fittingly describes its injustice.

The writer retains his conviction that it is wiser to have no code at all than to adopt the Negotiable Instruments Law in its present form. If, on the other hand, this law should be amended as suggested in this paper, the sooner it is enacted throughout the Union, the better.

James Barr Ames.

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[1] U. S. *v.* Spalding, 2 Mas. 478, 482. See the similar remarks by Beasley, C. J., in Hunt *v.* Gray, 35 N. J. Law 227, 233.

APPENDIX I.

[In addition to the differences already noted the Bills of Exchange Act contains the following provisions not adopted by the Negotiable Instruments Law.]

Form and Interpretaton.

SEC. 8. (1) Where a bill contains words prohibiting a transfer, or indicating an intention that it should not be transferable, it is valid as between the parties therto, but is not negotiable.

A check payable to M's order was crossed by the drawer "account of M, National Bank, Dublin." Held, that the check contained no words prohibiting a transfer or indicating an intention that it shall not be transferred, and M's indorsee could recover from the drawer. *Semble*, a check payable to order or to bearer can not be made non-negotiable except by crossing it in the manner provided by sec. 76. National Bank v. Silke [1891] 1 Q. B. 435. See S. C., *infra*, sec. 76.

SEC. 14. (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance, if the bill be accepted, and from the date of noting or protest, if the bill be noted or protested for non-acceptance or for non-delivery.

SEC. 14. (4) The term "month" in a bill means calendar month.

Capacity and Authority of Parties.

SEC. 22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

Under the Infants' Relief Act 1874 and Bills of Exchange Act sec. 22, an infant can not be held on a bill of exchange, even though it was given for necessaries and is in the hands of a holder in due course. *In re* Soltykoff [1891] 1 Q. B. 413.

Transfer.

SEC. 36. (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and henceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

A bill drawn for the acceptor's accommodation but which had never been negotiated was in the hands of the drawer after maturity, and having come into the possession of the drawer's solicitors, the latter claimed a lien on it for services previously rendered the drawer in an action to recover the bill from a converter, and sued the acceptor on the bill. Held, that plaintiffs taking the bill overdue could acquire no rights against the acceptor. Redfern v. Rosenthal, 86 L. T. Rep. 855.

An overdue bill indorsed in blank was sold in Norway on a judicial proceeding against one of several joint owners of the bill. By the laws of Norway the purchaser acquired a good title as against the equity of the other joint owners. Held, that although the bill was drawn and payable in England, sec. 36 (2) of the Bills of Exchange Act was not applicable and the purchaser was entitled to the bill. Alcock v. Smith, [1892] 1 Ch. 238; see also S. C. *infra,* sec. 72.

In the above case Lindley J. (p. 263), said that "'defect of title' is a phrase introduced into the Bills of Exchange Act in lieu of the old expression 'subject to equities,' which is an expression not adopted, because the Act applies to Scotland as well as to England, and 'subject to equities' is an expression not known to Scotch Law."

SEC. 36. (5) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour, takes it subject to any defect of title attaching thereto at the time of its dishonour, but nothing in this subsection shall affect the rights of a holder in due course.

Presentment for Acceptance.

SEC. 41. (1) (*e*) Where authorized by agreement or usage a presentment (for acceptance) through the post-office is sufficient.

Presentment for Payment.

SEC. 45. (5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

SEC. 45. (8) Where authorized by agreement or usage, a presentment (for payment) through the post-office is sufficient.

Notice of Dishonour.

SEC. 49. (6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

Protest.

SEC. 51. (6) (*a*) When a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return, if received during business hours, and if not received during business hours, then not later than the next business day.

SEC. 52. (2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

See Gordon v. Kerr, 25 Sess. Cas. 570 *infra*, sec. 87 (1).

SEC. 52. (3) In order to render the acceptor of a bill liable, is not necessary to protest it, or that notice of dishonour should be given to him.

Liability of Parties.

SEC. 57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser (*a*) the amount of the bill; (*b*) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (*c*) the expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of protest. (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

The damages given by this section are liquidated so as to permit the entry of judgment under Order XIV, rule 1, which gives power to a judge at chambers to order such entry when the writ is specially indorsed under Order III, rule 6, as for a liquidated demand. London, &c. Bank v. Clancarty, [1892] 1 Q. B. 689. The writ was indorsed "interest until payment or judg-

ment." So also as to a claim for noting and interest from date of the writ until payment. Lawrence v. Wilcocks, [1892] 1 Q. B. 696.

Section 57 is not exhaustive; it only determines what shall be deemed liquidated damages, and does not prevent recovery of special unliquidated damages recoverable before the statute. *In re* Gillespie, 16 Q. B. D. 702, affirmed 18 Q. B. D. 286. See S. C. *supra,* p. 160.

Where a bill protested for better security was accepted for the honor of the drawer it was held that the acceptor could not recover the expenses of protest for better security, nor a commission for accepting, as, under sec. 57, such expenses only as are "necessary" are recoverable and a protest for better security, while permitted, is not necessary. *In re* English Bank of the River Plate, [1893] 2 Ch. 438.

The words "bank charges" are a sufficient description of the expenses of noting. Dando v. Boden, [1893] 1 Q. B. 318.

When a bill has been dishonored abroad, the damages are recoverable only under sec. 57 (2), and the holder has no option to sue under sec. 57 (1). *Re* Commercial Bank, 36 Ch. Div. 522.

Discharges.

SEC. 60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

A banker's draft payable to order on demand, addressed by one branch of a bank to another branch of the same bank and not crossed, is not a check within the meaning of secs. 60, 82, B. E. A. But it is within sec. 19 of the Stamp Act 1853, which protects bankers *bona fide* paying such drafts to holders claiming under forged indorsements. Capital and Counties Bank v. Gordon, [1905] A. C. 240. See S. C., *infra,* sec. 82.

Crediting a customer with the amount of a check which he has, without authority, indorsed in the name of the payee per proc. the customer is not a payment of the check within sec. 60 B. E. A., but it is within sec. 19 Stamp Act 1853. Bissell v. Fox, 53 L. T. Rep. 193. See S. C., *infra,* sec. 82.

Lost Instruments.

SEC. 69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenour, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill he may be compelled to do so.

SEC. 70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Conflict of Laws.

SEC. 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows: (1) The validity of the bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

(*a*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

(*b*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where the bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another the due date thereof is determined, according to the law of the place where it is payable.

A bill was drawn in France (before the Act) by a Frenchman in French, but in English form on an English company, which accepted it. The drawer indorsed the bill in blank and sent it to an Englishman in England. Held, that the acceptor can not dispute the negotiability of the bill because the indorsement was invalid by French law. *Re* Marseilles Co., 30 Ch. Div. 598.

Interpretation here means "legal effect." Alcock v. Smith, [1892] 1 Ch. 238, 256, *semble*. See S. C. *supra*, sec. 36 (2). See also Embiricos v. Anglo-Austrian Bank, [1905] 1 K. B. 667.

Cheques.

SEC. 75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by: (1) Countermand of payment; (2) Notice of the customer's death.

A check to order of A delivered as a gift *causa mortis* was presented before death, but the banker refused payment because doubtful of the signature of the drawer, who died before it could be confirmed. Held, that the check was revoked by the death. *In re* Beaumont, [1902] 1 Ch. 889.

A banker is authorized to pay a bill accepted by a customer payable at the bank, but is not bound to do so in the absence of a special arrangement. Bank of England v. Vagliano, [1891] A. C. 107, 157, *semble*. See also Chalmers, Bills of Exchange, 6th ed. 255.

On October 31st plaintiff drew a check on defendant bankers. On the same day he telegraphed to countermand payment. The telegram was delivered the same day after office hours and put in the letter box in the door of the bank. By an oversight on the part of defendant's servants the telegram was not brought to the notice of their manager until November 2d. On November 1, the check was presented and paid. Held, that payment was not in fact countermanded within section 75 B. E. A. although it might be that it was due to negligence of the bank officials that the notice was not received in time to stop payment. If defendant was liable at all it would be in damages for negligence. Curtice v. London City & Midland Bank, [1908] 1 K. B. 293.

Crossed Cheques.

SEC. 76. (1) Where a cheque bears across its face an addition of

(*a*) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or,

(*b*) Two parallel lines simply, either with or without the words "not negotiable;" that addition constitutes a crossing and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of the banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

A check drawn payable to the order of M was crossed "account of M, National Bank, Dublin." This did not make the check non-transferable. National Bank v. Silke, [1891] 1 Q. B. 435; S. C. *supra.*, sec. 8 (1).

SEC. 77. (1) A cheque may be crossed generally or specially by the drawer. (2) Where a cheque is uncrossed, the holder may cross it generally or specially. (3) Where a cheque is crossed generally, the holder may cross it specially. (4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." (5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. (6) Where an uncrossed cheque, or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

SEC. 78. A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

SEC. 79. (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. (2) When the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to a banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided

that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed or to his agent for collection being a banker as the case may be.

The plaintiffs' cashier presented cheques drawn on defendant bank, payable to plaintiffs or bearer and crossed generally. Defendant gave in exchange for such cheques other cheques drawn by defendants on other banks and crossed generally. Plaintiffs had by their conduct held out their cashier as having authority to collect their bills by cheque, cash, or in any other way. The cashier collected the cheques handed to him through his own banking account and misappropriated the proceeds. *Held,* that giving cheques drawn by defendants for the cheques drawn on defendant was a payment but that defendant was not liable to plaintiffs in damages under section 79, sub. 2, as plaintiffs were estopped to deny the authority of their cashier to receive payment in that way. Mayer & Co. v. Sze Hai Tong Banking, etc., Co. [1913], App. Cas. 847.

SEC. 80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights, and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

SEC. 81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

A check crossed "not negotiable" was payable to a firm or order. One partner in fraud of his co-partner indorsed the check to defendant, who cashed it. Held, that the other partner, who by the partnership agreement was entitled to it, could recover the amount from defendant. Fisher v. Roberts, 6 T. L. R. 354.

SEC. 82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque, by reason only of having received such payment.

It is negligence for a bank to place to the credit of the secretary of a company the amount of a check drawn payable to the company or order, and crossed generally and indorsed by the secretary with the name of the company and his own name, without making any inquiries as to the authority of the secretary to deal with the check. Hannan's Lake View Central v. Armstrong, 5 Commercial Cas. 188.

A stranger having wrongfully obtained possession of a crossed check specially indorsed, obliterated the special indorsement, substituted one to himself, and presented the check to the defendant bank, to collect for him. The defendant collected the check and paid the money to the stranger. Held, that defendant was liable to the special indorsee for conversion of the check. Kleinwort v. Comptoir National d'Escompte de Paris, [1894] 2 Q. B. 157; Lacave v. Crédit Lyonnais, [1897] 1 Q. B. 148, accord.

Where the only transaction between an individual and a bank is the collection of a crossed check, such individual is not a customer of the bank. Mathews v. Williams & Co., 10 Reports, 210; 63 L. J. Q. B. D. 494.

One for whom a bank has been in the habit of cashing checks is not a customer, and the bank is not protected by sec. 82 in obtaining for him payment of a check crossed "& Co.," and marked "not negotiable," and which he had obtained by fraud. Great Western R'y v. London & County Bank, [1901] A. C. 414.

A customer of a banker stole a crossed check, forged the indorsement of the payee, and paid it into his own account. The banker is protected in receiving payment of the check and thereafter placing it to his customer's account, even though the account was overdrawn at the time of the deposit. Clarke v. London & County Bank, [1897] 1 Q. B. 552, as explained in Gordon v. London, &c., Bank, [1902] 1 K. B. at p. 270.

But if the banker at once credits the customer's account with the amount of the check, and allows him to draw against it, the banker in receiving payment of this check is not collecting it

for a customer, but for himself as holder, and is not protected by the section, and the true owner can recover from the banker. Capital & Counties Bank v. Gordon, [1903] A. C. 240, See S. C., *supra,* sec. 60.

But merely crediting the customer in the books of the bank with the amount of the crossed check before collecting it without notifying the customer or allowing him to draw against it, does not make the banker a purchaser or deprive him of the protection of section 82. Akrokerri Mines v. Economic Bank, [1904] 2 K. B. 465. *Quaere,* would not the result have been different if the entries had been made in the customer's pass-book? *Ib.* p. 470.

A banker does not lose the protection of this section merely because, before a crossed check paid in by a customer is cleared, he makes a credit entry in the bank's books or in the pass book not communicated to the customer. Bevan v. The National Bank (K. B. Div. Nov. 14, 1906) 23 T. L. Rep. 65.

By an Act August 4, 1906, section 82 was amended so as to get rid of the decision in Capital and Counties Bank v. Gordon, *supra,* by providing that a banker receives payment of a crossed check for a customer within the meaning of section 82 notwithstanding he credits his customers' account with the amount of the check before receiving payment thereof.

If the check is indorsed in the name of the payee per proc., the customer, the banker is put upon inquiry as to the right of the customer to indorse the check, and failure to make inquiry is negligence. Bissell v. Fox, 51 L. T. Rep. 663, affirmed 53 L. T. Rep. 193. See S. C., and also Capital and Counties Bank v. Gordon, *supra,* sec. 60.

Promissory Notes.

SEC. 84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

SEC. 85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenour.

SEC. 87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable.

By virtue of section 52 (2) failure to present to the maker on the day of maturity a note made payable at a particular place does not discharge the maker. Presentment at the particular place on a subsequent day is sufficient. Gordon v. Kerr, 25 Sess. Cas. 570.

SEC. 87. (3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

SEC. 89. (1) Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications to promissory notes. (2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. (3) The following provisions as to bills do not apply to notes; namely, provisions relating to,— (*a*) Presentment for acceptance; (*b*) Acceptance; (*c*) Acceptance *supra* protest; (*d*) Bills in a set. (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

The "necessary modifications" referred to in section 89 (1) would exclude Bank of England notes from the operation of the proviso of section 64 (1) (same as second sentence of section 124 N. I. L.) Leeds & County Bank v. Walker, 11 Q. B. D. 84.

Dividend Warrants.

SEC. 95. The provisions of this Act as to crossed cheques shall apply to a warrant for the payment of dividend.

Repeals.

SEC. 96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

SEC. 97. (1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto, notwithstanding anything in this Act contained.

SEC. 97. (3) Nothing in this Act or in any repeal effected thereby shall affect—

(*a*) The provisions of the Stamp Act, 1870 or acts amending it, or any law or enactment for the time being in force relating to the revenue; (*b*) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies; (*c*) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively; (*d*) The validity of any usage relating to dividend warrants or the indorsement thereof.

Construction with other Acts.

SEC. 99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

Scotland.

SEC. 98. Nothing in this Act, or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

SEC. 100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenour of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require. This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note, has undergone the sesennial prescription.

APPENDIX II.

COMPARATIVE TABLES OF SECTIONS OF BILLS OF EXCHANGE ACT AND NEGOTIABLE INSTRUMENTS LAW.

[In these tables a blank opposite a section of the one act indicates that there is no exactly corresponding section of the other act. The word "See" before a section of the one act indicates, in general, that the section is not the exact equivalent of the opposite section of the other act, but differs, in some cases substantially, in others only slightly. Or the section may sometimes merely suggest a similarity or an analogy.]

TABLE I.

N. I. L.	B. E. A.
1.	See 8 (1), 3 (2), 83 (1).
1–1–2–3.	See 3 (1).
1–4.	See 3 (1), 8 (2), 83 (1).
1–5.	6 (1).
2–1–2–3–4.	9 (1).
2–5.	
3–1–2.	3 (3).
4–1.	11 (1).
4–2.	
4–3.	11 (2).
5.	3 (2).
5–1.	83 (3), promissory note.
5–2–3–4.	See 16 (2).
6–1–2–3.	3 (4).
6–4.	See 91 (2).
6–5.	
7–1–2.	10 (1) (2).
8.	See 8 (4), 8 (5).
8–1.	
8–2–3.	5 (1).
8–4.	7 (2).
8–5.	See 7 (2).
8–6.	7 (2).
9–1–5.	8 (3).
9–2–4.	
9–3.	See 7 (3).
10.	
11.	13 (1).
12, first paragraph.	See 13 (2).
12, last paragraph.	
13.	See 12.
14.	See 20 (1), (2).
15.	
16.	21 (1), (2), (3).
17–1, first clause.	9 (2).
17–1, second clause.	
17–2.	9 (3).
17–3–4–5.	
17–6.	See 56.
17–7.	85 (2), promissory note.
18.	23, 23 (1), and see 23 (2).
19.	See 91.
20.	See 26 (1), (2).
21.	25.
22.	22 (2).
23.	24.
24, first clause.	
24, second clause.	30 (1).
25.	See 27 (1) (a) (b).
26.	27 (2).
27.	27 (3).
28.	
29.	28 (1), (2).
30.	31 (1), (2), (3).
31.	See 32 (1).
32, except last paragraph.	32 (2).
32, last paragraph.	
33.	See 32 (6).
34, first paragraph, first clause.	34 (2).
34, first paragraph, second clause.	See 34 (3).
34, last paragraph.	34 (1), 31 (2).
35.	See 34 (4).
36.	See 35 (1).
37.	35 (2), (3).
38.	See 16 (1).
39, first paragraph.	33.
39, last paragraph.	
40.	

TABLE I (*continued*).

N. I. L.	B. E. A.
41	32 (3).
42.	
43.	32 (4).
44.	31 (5).
45.	36 (4).
46.	
47.	36 (1).
48	
49, first paragraph.	31 (4).
49, last paragraph.	
50	37.
51, first clause.	38 (1).
51, last clause.	See 38 (3).
52–1–2–3.	29 (1) (a) (b).
52–4.	See 29 (1) (b)
53.	See 36 (3), bill, 86 (3), note, 73, check.
54.	
55.	29 (2).
56.	See 90.
57.	See 38 (2).
58, first paragraph.	
58, last paragraph.	See 29 (3).
59, first paragraph.	See 30 (2).
59, last paragraph.	
60.	See 88 (1), (2).
61, first paragraph.	See 55 (1).
61, last paragraph.	16 (1).
62.	54.
62–1–2.	See 54 (2) (a) (b) (c).
63.	See 56.
64.	
65–1–2–3–4.	See 58 (1), (2), (3).
66.	See 55 (2).
67.	See 56.
68, first paragraph.	See 32 (5).
68, last paragraph.	
69.	
70, first paragraph, first clause.	See 52 (1), (2), bill, 87 (1), note.
70, first paragraph, second clause.	
70, last paragraph.	45, bill, 87 (2), note.
71, first paragraph.	45 (1).
71, second paragraph.	See 45 (2), bill, 86 (1), note.
72–1–2–3.	45 (3).
72–4.	See 45 (3).
73–1.	45 (4) (a).
73–2.	45 (4) (b).
73–3.	See 45 (4) (c).
73–4.	45 (4) (d).
74.	52 (4).
75.	
76.	45 (7).
77.	See 45 (6).
78.	45 (6).
79.	See 46 (2) (c).
80.	46 (2) (d).
81.	46 (1)
82–1.	See 46 (2) (a).
82–2.	46 (2) (b).
82–3.	46 (2) (e).
83.	47 (1).
84.	47 (2).
85.	See 14 (1).
86.	14 (2).
87.	
88.	59 (1), last paragraph.
89.	48.
90.	See 49 (1).
91.	49 (2).
92.	See 49 (3).
93.	See 49 (4).
94.	49 (13).
95.	49 (7).
96.	See 49 (5), 49 (15).
97.	49 (8).
98, except last paragraph.	49 (9).
98, last paragraph.	
99.	See 49 (11).
100.	49 (11).
101.	See 49 (10).
102.	See 49 (12).
103.	See 49 (12) (a).
104–1.	49 (12) (b).
104–2.	
105.	49 (15).
106.	
107.	49 (14).
108.	
109.	50 (2) (b).
110.	
111.	
112.	50 (2) (a).
113.	50 (1).
114–1–2–3–5.	50 (2) (c).
114–4.	See 50 (2) (c) (4); Chalmers, 6th ed. 171.
115.	50 (2) (d).
116.	48 (2).
117.	48 (1).
118.	See 51 (1), (2), bill, 89 (4), note.
119–1.	59 (1).
119–2.	59 (3).

TABLE I (*continued*).

N. I. L.	B. E. A.
119–3.	See 63 (1), (2).
119–4.	
119–5.	61.
120–1–3–4–5–6.	
120–2.	See 63 (2).
121, 121–1.	See 59 (2) (a) (b).
121–2.	59 (3).
122.	62 (1), (2).
123.	63 (3).
124, first paragraph.	64 (1).
124, second paragraph.	See 64 (1), proviso.
125–1–3.	64 (2).
125–2–4–5.	See 64 (2).
126.	See 3 (1), (2), 8 (4).
127.	See 53 (1), (2).
128.	See 6 (2).
129.	See 4 (1), (2).
130.	5 (2).
131.	15.
132, first paragraph.	17 (1), see 21 (1).
132, second paragraph.	See 17 (2) (a).
132, third paragraph.	17 (2) (b).
133.	
134.	
135.	
136.	See 42.
137.	
138.	18 (1), (2), (3).
139.	19 (1), (2).
140.	19 (2) (c), last paragraph.
141.	19 (2).
142, first paragraph.	44 (1).
142, second paragraph.	See 44 (2).
142, third paragraph.	44 (3).
143–1.	See 39 (1).
143–2–3.	39 (2), (3).
144.	See 40 (1).
145.	41 (1) (a).
145–1.	41 (1) (b).
145–2.	41 (1) (c).
145–3.	See 41 (1) (d).
146.	See 92.
147.	39 (4).
148–1.	See 41 (2) (a).
148–2.	41 (2) (b).
148–3.	41 (2) (c).
149–1–2.	43 (1) (a) (b).
150.	See 42.
151.	43 (2).
152.	51 (2).
153.	See 51 (7).
154.	See 94.
155.	See 51 (4), 93.
156.	51 (6), and 51 (6) (b).
157.	51 (3).
158.	See 51 (5).
159.	51 (9).
160.	51 (8).
161, first paragraph.	65 (1).
161, second paragraph, first clause.	65 (2).
161, second paragraph, second clause.	
162.	See 65 (3).
163.	65 (4).
164.	66 (2).
165.	66 (1).
166.	65 (5).
167.	67 (1).
168.	See 67 (2).
169.	See 67 (3).
170.	67 (4).
171.	68 (1).
172.	68 (3).
173.	68 (4).
174.	68 (2).
175.	68 (5).
176.	68 (7).
177.	See 68 (6).
178.	71 (1).
179.	71 (3).
180.	71 (2).
181.	See 71 (4).
182.	71 (5).
183.	71 (6).
184, first paragraph.	See 83 (1).
184, last paragraph.	See 83 (2).
185.	73.
186.	See 74 (1).
187.	
188.	
189.	See 53 (1), 73.
190.	See 1.
191, except "Acceptance," "Bank," "Bill" and "Instrument."	2.
191, "Acceptance."	2–21 (1), last paragraph.
191, "Bank."	See 2.
191, "Bill."	See 2.
191, "Instrument."	
192.	

TABLE I (*continued*).

N. I. L.	B. E. A.	N. I. L.	B. E. A.
193	40 (3), 45 (2) 73, 74 (2), 86 (2), 89 (1).	195.	
		196.	See 97 (2).
		197.	
194	See 14 (1) (a) (b), 92.	198.	

TABLE II.

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